

MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

**KING'S BENCH,
CHANCERY, COMMON PLEAS,**

AND

EXCHEQUER.

VOLUME THE FIFTH.

MODERN REPORTS

SELECT CASES

OF THE

COURTS



OF THE
CHANCERY

AND
EQUITY

VOLUME THE FIFTH

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VOLUME THE FIFTH;

BEING,

A Continuation of several Special Cases argued and adjudged in the Court of KING'S BENCH, in the Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Years of the Reign of KING WILLIAM THE THIRD; and Judgments thereupon: together with *Special Pleadings* to most of the Cases.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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1794.

MODERN REPORTS
 SELECT CASES
 IN
 THE COURTS
 OF
 KING'S BENCH
 CHANCERY COMMON PLEAS
 &c.
 BY JOHN GOSSET



A COMPLETE AND ACCURATE COLLECTION OF THE
 REPORTS OF THE CASES DECIDED IN THE
 COURTS OF KING'S BENCH, CHANCERY,
 COMMON PLEAS, &c. FROM THE YEAR
 1750 TO THE PRESENT TIME.

THE SECOND EDITION
 CORRECTED
 WITH THE ADDITION OF SEVERAL CASES DECIDED
 BY THOMAS LEACH, ESQ.
 OF THE MIDDLE TEMPLE, BARRISTER AT LAW.
 LONDON:
 PRINTED FOR E. & J. RIVINGTON, 15, N. B. STREET;
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 J. WHITE, 10, N. B. STREET.

THE P R E F A C E.

THE REPORTS of Cases adjudged in former ages, which BRACTON calls "*the Judgments of the Just,*" are so very beneficial to the Publick, that it has been the care of several Kings to transmit them to posterity; and for that purpose *King Edward the Third*, and several of his successors, did, in their respective reigns, appoint four discreet men to report the judicial decisions in the great courts of justice, that those judgments which were given there might be established by time and usage, and that parallel Cases might receive uniform and certain determinations.

THE Reporters thus appointed by THE STATE, had a constant and fixed salary from the Government, as a just reward for their labours, which have been long since published in several volumes, called THE YEAR-BOOKS, containing the arguments of Counsel at the bar, and the resolutions of Judges on the bench; in a continued course of time, from the first year of *Edward the Third* to the twelfth year of *Henry the Eighth*, for almost two hundred years.

See the first Volume of Mr. Christian's Edition of Blackstone's Commentaries, page 73; and Mr. Reeves' History of English Law, vol. ii. page 357, and vol. iii. page 147. 254.

THE PREFACE.

AFTER the first twelve years of *King Henry the Eighth*, this method was discontinued. It is true, there are some Cases from that time to the twenty-seventh year of *Henry the Eighth*, which are bound up with THE YEAR-BOOKS; but *Mr. Fleetwood* tells us, "They are collected with so little judgment, that he did not think them worthy to be placed in the Tables which he made of those Books," and therefore composed A TABLE of them by itself.

See Mr.
Reeves' His-
tory of Eng-
lish Law,
vol. iv. page
185.

It is very remarkable, that there are no memorials extant who these Reporters were, not so much as the initial letters of their names, or of what HOUSES they were; but it is probable by their number, that each of them was chosen from the respective Inns of Court, and it is certain they were very industrious men; we have my LORD COKE's word for it, who extols their diligence, and metaphorically tells us, "that if it had not been for their Writings, the judgments of so many sages of the law had, with their bodies, been worn away with the worm of oblivion." And though this may be the fate of their books, yet the same great Judge has recommended them to our reading, assuring us, "that out of the old fields the new corn must spring."

1599. Plowd.

THE next, in order of time, was MR. PLOWDEN, a *Middle-Temple-man*, who collected two volumes of Cases, from the second year of the reign of *Edward the Sixth* to the twenty-second year of the reign of *Queen Elizabeth*, for his private use; but having lent his manuscript to some lawyers, whose clerks were so diligent, in those days, as to sit up whole nights to transcribe it, designing it for the press, he therefore resolved to publish it himself, and hath assured us, "that all the pleadings are on special verdicts, or demurrers; that he

THE PREFACE:

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“ he had the copies of the records, and studied the
“ Cases before they were argued ;” and we have his
word for it, “ that for surety of law, his books passed
“ all former Reports.”

ABOUT two years afterwards, the nephews and ex-
ecutors of SIR JAMES DYER, another lawyer of *the*
Middle-Temple, published his Reports, being assailed
(as they call it) “ by men of good countenance for that
“ purpose.” These were the only Reports which
were published in eighty years after THE YEAR-BOOKS ;
but we have been told, that this defect has been amply
recompensed by the grandeur and authority of this
single Judge ; and yet his book is composed of very
short notes, which, my LORD COKE says, “ is less
“ painful, but not less profitable, than more elaborate
“ Works.”

1601. See
Mr. Vail-
lant's Edition
of Sir James
Dyer's Re-
ports.

ABOUT the same time SIR JOHN COKE, the eldest
brother of the Judge of that name, and who was after-
wards a Judge himself, having gotten MR. KEILWAY'S
manuscript of Law Cases, committed so many of them
to the press as he thought fit to publish, and told
his reader, that there he might find “ *multa subtiliter*
“ *disputata, et summo cum judicio determinata, quæ alibi*
“ *non leguntur* ;” which is very true, for there are many
Cases argued and adjudged in the reign of *Henry the*
Seventh, and his son *Henry the Eighth*, which are not
printed in any of the former Reports.

1601. Keilway

IN the same year the LORD CHIEF JUSTICE COKE
published the first volume of his Reports, and having
for twenty years before “ observed the true reasons of
“ such matters in law wherein he was of Counsel, and
“ which were adjudged upon great and mature deli-
“ beration,” he afterwards consented to the printing
ten volumes more, which were nineteen years in pub-
lishing ; and it is remarkable, that in all that time there

1601. See
the Preface
to the First
Report.

was no other Report printed; as it became all the rest of the lawyers to be silent whilst their ORACLE was speaking. But notwithstanding the character of this great Judge, his works were censured even in his life-time; for being removed from the seat of Chief Justice of England, in *Michaelmas Term*, in the fourteenth year of *James the First*, a commission was granted to SIR HENRY MOUNTAGUE, his immediate successor in that place, and to others, to review and reform his Reports; some part whereof, he tells us himself, “were writ in the *tempest of business*, and therefore he “could not polish them as he desired.”

It is likewise to be observed, that there was not any Report published in the space of twenty-two years after my LORD COKE's last volume came forth; though, he tells us, “there was a flourishing spring of learning at “that time, and that he encouraged the lawyers of that “age to follow his example, to register in books the “sayings and doings which were in their time worthy of “note and observation:” But none would undertake it, unless it was SIR HENRY HOBART, his immediate successor in the *Common Pleas*, who collected a volume of Cases adjudged in that Court, but did not think fit to publish them in his life-time. However, it was set forth sixteen years after his death by an unskilful hand; but, as my LORD CHANCELLOR FINCH observed, it was beautiful even in confusion; and I may very well affirm, that now it is corrected by his pen, it infinitely excels most other books of that kind, both in purity of language, and in soundness of reason.

March, 1648 Soon after the martyrdom of King *Charles the First*, there came forth a flying squadron of thin Reports, of which MR. MARCH led the van, most of them very good; but the best of that number are the Cases which were adjudged in that reign collected by SIR GEORGE CROKE, and published by his son-in-law SIR HAR-

1651. See a fourth Edition of these Reports, published in 8vo, in the year 1790.

HARBOTTLE GRIMSTONE, during the Usurpation; in Godb. 1653
 which time, and within the space of twelve years, there
 were twenty-one Reports published in the names of Gouldf. 1653
 Judges, Serjeants at Law, Prothonotaries, and other Poph. }
 lawyers of less characters; as may be seen in the Hutt. } 1656
 margin; insomuch as MR. BULSTRODE, who was Noy,
 made Chief Justice of *North-Wales* by CROMWELL,
 and who was the first Lawyer after my LORD COKE Win. }
 who published a Report in his life-time, complained of Lane, } 1657
 those flying Reports, which he compared to the soldiers
 of *Cadmus* daily arising, and justifying each other: and
 yet there were very fair pretences made at that time for
 the publishing all these volumes; some from the manu-
 scripts of judicious persons; some from the copies taken 2. Cr. }
 out of the libraries of eminent Judges, or Serjeants at 2. Bul. } 1658
 Law, where they had been a long time hoarded for Style,
 their private use; but falling then into the hands of 1. Le. }
 men of public spirits, and who were more communi-
 cative of learning, they either out of a hearty zeal to
 the common good were willing, or by importunities 2. Le. }
 were prevailed on, to transmit them to the press. Ley. } 1659
 And I remember a particular reason was given for
 printing JUSTICE HUTTON's Reports, which was,
 "that he being cotemporary with my LORD HOBART,
 "both those Judges might, like *Cicero* and *Roscius*,
 "make one incomparable man;" which (by the way)
 was no very good compliment to either. 3. Bul.

It is true, the fertility of the press was, even at that
 time, accounted a fault; but it was in a reforming age,
 which made the lawyers consult the Scriptures, that
 they might, with authority, reject all those "*spurious*
 "*births without living fathers*;" which is the best cha-
 racter MR. STYLE gave them, and who had as little
 reason as any man to express himself in that manner.
 But he is the person who tells us, "These Reports
 "spoke so plain in the language of *Ashdod*, that a wise
 "man could never believe they sprang from *Israelitish*
 "parents."

SOON

1661 { Yelva
Cr.E.
Bend. Soon after the Restoration of *Charles the Second* a
1662 Latch. check was given to the prefs by a statute, "prohibiting
1663 Moore "all law-books to be printed without the licence
1664 1. And. "of the Lord Chancellor or Keeper, the Chief Justices
1665 2. And. "of each Court, the Chief Baron; or one or more of
"them, or of one by their appointment;" which act,
after several continuances, expired in *King William's*
reign.

1675 { Jones
1. Ro. BUT in conformity to this law, most of the Reports
4. Le. which were printed, whilst it was in being, were licensed
1676 2. Roll. by the Chancellor and Judges, only the First Part of the
1677 Vaugh. LORD ANDERSON'S Reports and the FIRST MODERN
1678 Palmer had not that advantage; for an advantage it must ne-
1682 1. Mod. cessarily be in many respects for any book to come
1683 { 1. Sid.
Lit.
Rep. forth with so great a solemnity. Notwithstanding,
SERJEANT MAYNARD, in his argument of the special
verdict between *Hitchins* AND *Bassett*, in the court of
king's bench, in the year 1684, citing a case taken by
himself fifty years before, told the Court, "It was of as
(a) 3. Mod. "good authority as any which had been printed
203. "since (a);" which takes in every Report of my
1. Show. 537. LORD COKE'S.

2. Sid. 1684 IN the reign of *James the Second* there were seven
3. Keb. 1685 Reports published, some of them inferior to none
Saund. 1686 before: but I cannot help taking notice, that some
Aley, 1688 other Reports, at that time, were licensed in a very
unusual manner a year after the books were printed,
with the bare "allowance" only of the impression,
without certifying to the world (as is usual in such
cases) "the great judgment, learning, and wisdom of
"the author."

Hardr. 1693 AFTER THE REVOLUTION, and during the reigns of
Jones, 1695 KING WILLIAM and her late Majesty, there have been
thirteen Reports published, most of which, to express
myself

myself in my * LORD COKE's words, "set open the
 " windows of the law to let in the gladsome light,
 " whereby the reason thereof may be clearly dis-
 " cerned." And though some of them, as JUSTICE
 SHELLEY merrily said, might be compared to *Banbury*
cheeses, whose superfluities being pared away there
 would not be enough left to bait what my LORD HALE
 called "*the mouse-trap* of the law;" yet to speak still in
 the language of a Judge, "I think the meanest of
 " them may, † like the little birds, add something to
 " the building the eagle's nest."

* Preface to
 6. Rep.
 Ve. 2. } 1696
 Ray. }
 2. Mod. 1698
 3. Mod. 1700
 Levinz, 1702
 4. Mod. 1703
 2. Lutw. 1704
 Shower, 1708
 5. Mod. 1711
 † Preface to
 8. Rep.

AND thus I have given an historical account of our
 Reports, which a country lawyer (who was afterwards
 advanced to the seat of justice) told THE BAR were
 too voluminous; for when he was a student, he could
 carry a complete library of books in a wheelbarrow;
 but that they were so wonderfully encreased in a few
 years, that they could not then be drawn in a waggon.

WHAT would he have said if he had looked into
 the *Codes*, the *Pandects*, the *Institutes*, the *Novels*, and a
 vast number more of glosses and explanations of THE
 CIVIL LAW, not only by the old commentators, but
 by *Budæus*, *Duaren*, *Tiraquill*, *Hottoman*, and many more
 of the last century? And if this grave lawyer accounted
 eighty volumes of the Common-Law Reports to have
 been too great a number, though they have been
 almost four hundred years in publishing, certainly he
 would have been amazed at the *Theodosian* and *Justinian*
Codes, the *Capitularies*, the *Decrees* and *Decretals*, the
Orders and *Constitutions of Bishops*, the *Cursus Canonicus*,
 the *Clementines*, *Concordates*, and an infinite number of
 volumes of THE CANON LAW, too tedious to be re-
 peated.

I SHALL only add, that let the volumes of Law-Books
 be what they will, the sufficiency of every author must
 appear

appear from his works, and not from his picture before the title-page, or from any other artificial embellishment there, which was never attempted by the publisher of these Reports who was induced to commit them to the printer, being assured long since, by a most learned Judge, that this way of reporting is the most perspicuous course of teaching the law.

It is a satisfaction to him who is in obscurity to see some of his labours accepted by the Publick, who would likewise be very well pleased to see those who censure them attempt something of this nature themselves; and therefore he will conclude this Preface to his *last** Report as my LORD COKE did that of his *first*:

*Cum tua non edas, his utere, et annue, lector,
Carpere vel noli nostra, vel ede tua.*

W. N.

* NOTE, The FOURTH PART is intitled
the Last by mistake.

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MICHAELMAS

MICHAELMAS TERM,

The Sixth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

Sir Samuel Eyres, *Knt.*

} *Justices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

Memorandum.

Case 1.

AT the beginning of this Term, SIR ROBERT ATKINS,
Chief Baron, resigned his office of Chief Baron.

Memorandum.

Case 2.

JOHAN HAWLES, of *Lincoln's Inn*, was made King's Counsel
during the Vacation.

* Pope against St. Leiger.

• [1]

Case 3.

MIDDLESEX, } **J**OHANNES ST. LEIGER nuper, &c. A DECLARA-
to wit. } *alias dictus, &c. summonitus fuit ad respon-* tion in an ac-
dend. ROGERO POPE, armiger. de placito quod reddat ei centum et tion of debt for
septem libras et decem solidos quos ei debet et injuste desinet, &c. Et a hundred gui-
unde idem ROGERUS per A. B. attornatum suum dicit quod cum ness, on a wa-
prædict. J. ST. LEIGER et R. POPE octavo die Julii anno Domini ger concerning
1691, apud parochiam SANCTI MARTINI IN CAMPIS in com. MID. the manner of
latrunculis luser. ad ludum ANGLICE vocat. "Back-gammon." BACK GAMMON
player touches a man he is obliged to move it, to be decided by THE GROOM PORTER.—Clift, Ent,
200. 4. Mod. 409. 1. Salk. 344. 1. w. 484, 487.

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POPE
against
ST. LEIGER.

* [2]

The terms of the
wager reduced
into writing.

THE GROOM-
PORTER de-
cides in favour
of the plaintiff.

The defendant
makes defence
and demands
oyer of the writ.
By which is read to him.

Cumq. ad ludum illum præd. ROGERUS adtunc et ibidem uno jactu
jecit quatuor super unam aleam, quatuor super alteram aleam AN-
GLICE "threw two fours." Cumque super inde præd. R. adtunc
et ibidem tetigit et paulatim movit duos latrunculorum suorum il-
lorum ANGLICE "two of his table-men" sed non amovit illos
a statione sua ANGLICE "off from the point they stood on."
Cumque super inde adtunc et ibidem pignore certat. fuit ANGLICE
"a wager was laid" inter præd. J. ST. LEIGER et præfat. R.
modo sequen. videlicet quod præd. R. solveret præfat. JOH. ST.
LEIGER centum et quinquaginta nummos aureos ANGLICE vocat.
"guineas" si præfat. R. tenebatur jure lusus illius amovere AN-
GLICE "to play" duos latrunculos illos quos ita movit; quodque præd.
J. ST. LEIGER solveret præfat. ROGERO centum nummos aureos
si præd. R. non tenebatur jure lusus illius amovere ANGLICE "to
"play" duos latrunculos illos quos ita movit; et præd. J. ST.
LEIGER et R. adtunc et ibidem pro determinatione * pignorationis
illius ANGLICE "of that wager" posuere se super judicium atriensis
Angliæ ANGLICE "of the groom-porter of England." Cumque
præd. JOHANNES ST. LEIGER eisdem die et anno supradicti. apud
paroch. præd. per scriptum suum sigillis suo sigillat. curiæque domini
regis et domine reginæ nunc hic ostens. cujus dat. est eisdem die et anno
cognovit pignoratione præd. ANGLICE "the said wager." Et præd.
J. ST. LEIGER per idem scriptum obligavit seipsumolvere præfat.
R. P. vel ordini suo centum nummos aureos ANGLICE vocat.
"guineas," quando atriensis ANGLICE "so soon as the groom-
"porter" adjudicaret ANGLICE "should give his judgment"
in casu illo si accideret quod judicium illud foret contra præd. J.
ST. LEIGER. Et in facto idem ROGERUS dicit quod postea
post confessionem scripti præd. et ante impetrationem brevnis originalis
præd. ROGERI in curia hic, scilicet 31 die Julii anno Domini 1691
supradicto, quidam THOMAS NEALE armig. tempore confessionis
scripti præd. et diu antea et abinde adhuc existen. atriensis Angliæ
ANGLICE "the groom-porter of England" in casu præd. ad-
judicavit contra præd. J. ST. LEIGER, scilicet quod præd. RO-
GERUS non tenebatur jure lusus illius amovere ANGLICE "to
"play" duos latrunculos illos quos ita movisset nisi movisset illos a
statione sua ANGLICE "off from the point;" quodque centum
nummi aurei ANGLICE vocat. "guineas" tempore confessionis
scripti præd. et diu antea fuer. et adhuc exist. valoris præd. centum
et septem librarum et decem solidorum, scilicet apud paroch. præd.
in com. præd.; unde præd. J. ST. LEIGER adtunc et ibidem ba-
buit notitiam: præd. tamen JOHANNES ST. LEIGER licet sæpius
requisit. præd. centum et septem libras et decem solidos eidem ROGERO
non reddidit, sed ill. ei beneque reddere omnino contradixit, et adhuc
contradicit; unde dicit quod deterioratus est et damnum habet ad va-
lentiam 40l.; et inde produc. sectam.

Et præd. JOHANNES, per EDMUNDUM HUBBERFEILD attor-
natum suum, venit et defendit vim et injuriam quando, &c. et petit au-
ditum scripti præd. et ei legitur in hæc verba ff. "I JOHN ST. LEIGER

" of

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" of &c. do own, that I have betted with *Lieutenant Colonel*
 " *Roger Pope* an hundred guineas against one hundred and fif-
 " ty, concerning a dispute arising on the manner of playing a
 " cast at BACKGAMMON, which is stated and signed by us both,
 " and *Captain Francis Chantrel*, and referred to the decision of
 " THE GROOM-PORTER of England. And I do by these presents
 " oblige myself, on the word and honour of a gentleman, to
 " pay to the said *Roger Pope* or his order, or whom he ap-
 " points to receive it, an hundred guineas so soon as THE
 " GROOM-PORTER gives his judgment on the case, if it so
 " happen that the judgment be against me. The question to
 " THE GROOM-PORTER is stated under the letters *A. B. ** and
 " *C.*; *John St. Leiger* is meant by *A.* and *Roger Pope* by *B.*
 " Given under my hand and seal July 8, 1691 "

Pope
 against
 St. Leiger,

* [3]

The defendant
 then pleads in
 bar of the ac-
 tion the statute
 16. Car. 2. c. 7.
 against excessive
 gaming.

lectis et auditis idem JOHANNES dicit quod ipse de debito præd. virtute scripti præd. onerari non debet; quia dicit quod in statuto in parlamento DOMINI CAROLI SECUNDI nuper regis Angliæ inchoat. apud Westm. in com. MIDDLESEX octavo die Maii anno 10 regni dicti domini nuper regis decimo tertio et per diversas prorogation. et adjournament. ibid. continuat. usque decimum sextum diem Martii anno regni ejusdem nuper regis decimo sexto (inter alia) inactitatum fuit quod si aliqua persona vel personæ ad aliquod tempus vel tempora post vicesimum nonum diem Septemb. in anno Domini 1664 luderet seu luderent ad et cum pictis chartis ANGLICÆ " cards," aleis latrunculis pilis palmariis ANGLICÆ " tennis," globulis ANGLICÆ " bowls," clavibus ligneis ANGLICÆ " skittles," mensa lubrica ANGLICÆ " shovelboard," vel ad alium lusum ANGLICÆ " pastime," ludum vel ludos quoscunque (aliter quum) cum et pro pecuniis deposit. ANGLICÆ " ready money," vel pignoreret ANGLICÆ " shall bett" ex partibus ANGLICÆ " upon the fides," vel super manus eorum qui ludunt vel luderet ad inde et perderet aliquam summam vel summas monetæ vel aliam rem vel res sic in lusum posit. ANGLICÆ " played for" exceden. summam centum librar. ad aliquod unum tempus vel congressum super notam ANGLICÆ " upon ticket," vel credentiam ANGLICÆ " credit," vel aliter, et non solveret ead. in manibus ANGLICÆ " shall not pay down the " fame" ad tempus quando ill. vel illi sic perderet ead. persona vel personæ quæ perdidissent sive perdidissent diem monet. vel aliam rem sive res sic in lusum posit. sive ponend. ANGLICÆ " so played or to " be played for" ultra summam centum librar. in tali casu non obligaretur seu compeller. vel compellend. erit solvere seu respondere ANGLICÆ " to make good" eadem; sed contract. per iisdem et pro qualibet parte inde et omnia et singula judicia statuta recogn. ANGLICÆ " recognizances," mortgagia ANGLICÆ " mortgages," conveyanciæ, assuranticiæ, obligationes ANGLICÆ " bonds," billæ, specialitates, promissiones, conventiones, agreementa, et alia acta facta et securitates quæcunque quæ erunt obtent. fact. dat. cogn. sive intrat. ANGLICÆ " entered into" pro securitat. sive satisfaction. eorundem vel pro eisdem vel aliqua parte inde erunt vacua et nullius effectus prout per eundem actum inter alia plenius apparet. Et idem

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Pope
against
St. Leger.

[4]

JOHANNES in facto dicit quod post 29. diem Septembris anno Domini 1664 supradict. et ante confect. scripti prædict. scilicet præd. octavo die Julii anno Domini 1691 supradict. apud parochiam præd. in com. præd. ipse idem JOHANNES et præd. ROGERUS ludebant cum aleis ad quendam ludum vocat. "backgammon;" quodque præd. nummi aurei vocat. "guineas" in præd. scripto mentionat. adtunc et ibidem ad unum tempus et unum congressum ANGLICE "meet-ing" fuerunt pignorat. ANGLICE * "betted" per eundem JOHANNEM cum præd. ROGERO et perdit. in lusu illo et non cum vel pro pecuniis deposit. ANGLICE "ready money;" quodque præd. centum nummi aurei vocat. "guineas" tempore pignorationis illius ANGLICE "at the time of the said bett" necnon tempore adjudicationis in narratione ROGERI præd. per THOMAM NEALE in eadem narratione mentionat. fieri supposit. fuer. valoris ultra summam centum librarum VIDELICET valoris centum et septem librarum et decem solid. superius petit. VIDELICET apud paroch. præd. in com. prædict. quodque præd. centum nummi aurei tempore lusus illius non fuer. pignorat. ANGLICE "betted" in pecuniis deposit. ANGLICE "ready money"; neque tempore adjudicationis præd. in narr. præd. fieri supposit. s. ut. sed pro securitate solution. præd. centum nummor. aureor. per ipsum JOHANNEM cum præd. ROGERO ut præfertur pignorat. ANGLICE "betted." Idem JOHANNES postea scilicet præd. octavo die Julii anno Domini 1691 supradict. apud paroch. præd. in com. præd. scriptum præd. in narratione præd. mentionat. præd. ROGERO dedit sigillavit et ut factum suum deliberavit, per quod ac vigore statut. præd. in eo casu inde edit. et provis. scriptum præd. fuit et est vacuum et nullius vigoris in lege. Et hoc paratus est verificare; unde petit judicium si ipse de debito prædicto virtute scripti præd. onerari debeat, &c.

C. LEVINZ.

Demurrer.

To this the plaintiff, Roger Pope, demurs generally.

FR. PEMBERTON.

Judgment for plaintiff.

JUDGMENT was given in the court of common pleas, upon the above record, in favour of the plaintiff.

Writ of error.

And upon that judgment the defendant brought a writ of error.

Qu. If an action of DEBT will lie on a wager respecting the mode of playing BACK-GAMMON, on a written agreement whereby

BRODERICK for the plaintiff in error. The plaintiff in an action of debt in the common pleas demands one hundred guineas, of the value of one hundred and seven pounds ten shillings. The defendant pleads, that when the wager was laid, he and the plaintiff were at a play called back-gammon, and pleads the statute of gaming, and avers that this was for money won at play at tables, being for above the sum of one hundred pounds, and so was void the parties refer the decision to the groom-porter, and one of them (the loser) binds himself in these words, "I do by these presents oblige myself, on the word and honour of a gentleman, to pay, &c."— S. C. 4. Mod. 409. S. C. 1. Lut. 434. S. C. N. Lut. 147. S. C. Salk. 344. S. C. Comb. 327. S. C. Skin. 572. S. C. Carth. 322. S. C. 12. Mod. 81. S. C. Holt, 550.

by

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by the statute; to which the then plaintiff demurs, and judgment was given for him in the common pleas. And we bring error.

Pope
against
St. LEIGER.

* FIRST, I think *debt* will not lie (a) on this wager, &c.

* [5]

SECONDLY, The plaintiff ought not to declare of so many guineas *valoris*, &c. I agree to the cases of *Rastil v. Draper* (b), and *Willshalge v. Davige* (c); but here a guinea is English money, of which the Court takes notice; and in such cases it is never declared *ad valentiam* (d). A guinea in law is no more than twenty shillings, and in an action on the case, damages shall be given for them according to the value; but in debt for them, the plaintiff never declares for more than twenty shillings, and so you lately adjudged in this court, in the case of *Harrison v. Byron*; in which case it was adjudged, that the Court judicially takes notice of a guinea; and that the legal value of it is but twenty shillings, though by consent it may pass for more (e); so that this judgment is erroneous.

25. If a declaration in debt for so many pieces of gold coin called guineas, of such a value, is good.

1. Salk. 9. 12.
25. 446.
Pal. 407.
2. Keb. 463.
Post. 7.
Rast. Ent. 158.b.

THIRDLY, The deed being entered of record, is parcel of the plea; and if by that it appear that the plaintiff has not cause of action, he cannot have judgment, though the defendant has misbehaved himself (f); and therefore our admittance of the value of the guineas will not hurt us, and we need not to have mentioned this variance from the deed; and this was a point not touched in the common pleas.

A deed entered of record, is parcel of the plea.

FOURTHLY, Then *non constat* in what case "*in casu illo*," for it is not mentioned before, and the money is not to be paid by the deed before the GROOM-PORTER has given judgment in that case; and as to that the declaration is, that Pope stirred two of his tablemen, "*sed non amovit illos a statione sua*, ANGLICE from the point they stood on:" and a wager was laid, Whether the said Pope was bound by the law of the play, to play those men which he so stirred? And they put it to the determination of the GROOM-PORTER, "*cumque* præd. J. ST. LEIGER (*die, anno, et loco*) per "*scriptum suum sigillat. curiæq. dom. regis et dom. reginæ nunc hic* "*ostens. cujus*, &c. *cognovit pignorationem* præd. ANGLICE "the "*said* wager;" et præd. J. S. per *idem scriptum obligavit seipsum* "*solvere præfat. R. POPE vel ordini suo centum nummos aureos* "*ANGLICE vocat.* "guineas, quando atriensis ANGLICE so soon "*as the GROOM-PORTER adjudicaret ANGLICE should give his* "*judgment*" in *casu illo* si *accideret* *judicium illud fore contra* "*præd. J. ST. LEIGER.*" In *casu illo*: in what case? for it is not mentioned before, and the money is not to be paid by the deed, before the GROOM-PORTER has given his judgment in that case.

Cases in Law & Equity, 336.

Ante, 2.

(a) See *Bovey v. Castlemain*, 1. Ray. 69.; *Hard's Case*, Salk. 23.; and *Walker v. Walker*, post. 17.

(b) *Yelv. 80.* S. C. *Cro. Jac.* 83.

(c) 1. *Leon.* 41.

(d) *Ward v. Ridgwin*, *Latch.* 84.

(e) See the 7. & 8 *Will.* 3. c. 19. s. 12.

(f) 1. *Saund.* 316.

If two persons play at back-gammon, and one of them touch a tableman without making his move, a wager laid between the players that by the laws of the game, who ever touches a man is obliged to play it, is not within the statute 16. Car. 2. c. 7. against gaming, for the wager was not on the game, but on the mode of playing it.

- Post. 131. 175.
- 3. Lev. 118.
- 2. Vent. 175.
- 1. Salk. 484.
- 2. H. Bl. Rep. 43.
- 4. Com. Dig. "Justice of Peace" (B 42.).
- Esspinaffe Dig. 19.
- 2. Bac. Abr. 623.
- Cowp. 281.
- 1. Term Rep. 56.
- 2. Term Rep. 610. 616.
- 3. Term Rep. 693.
- 4. Term Rep. 1.

FIFTHLY, Then our plea is good; for we plead the statute of gaming, and that being at *back-gammon*, these hundred guineas were wagered on that game; and so not being for ready money, it is void by the statute: now we may aver by the statute * against our own deed (a), and the demurrer has confessed this. And though the averment be not good, yet it appears by the declaration to be within the words and intention of the statute of gaming, for the money is above a hundred pounds, and is lost on tick; and it appears by the declaration how it was lost, that it was at *back-gammon*, and that the money was won at play at that game, though the judgment of the GROOM-PORTER was at another time. The statute of gaming would be of little use, if it is not extended to by-bets, but only to the gaming itself. This act has always been construed liberally; and therefore where a man lost eighty pounds at one day, and then the parties agreed to play at another day, when eighty pounds more was lost, this was adjudged (b) to be within the statute, and to be but one loss; and that statute was made to prevent great mischiefs. If any of these points are for us, then I pray that judgment may be reversed.

HOLT, Chief Justice. Do you make laying a *wager* to be within the statute of gaming? It is true, they were at play when the wager was laid.

EYRE, Justice. Suppose the wager had been, that the tables were made of brazil, had this been within the statute? Certainly no: no more shall this.

PEMBERTON, Serjeant. It is plain that this is not within the statute of gaming; for to make it so, it must be betted on the hand of the plaintiff or defendant; but this wager was laid on a collateral matter on the right of play, which is not within the act (c).

E contra. FIRST as to the declaration, The writing produced maintains it, for it is the very same with the declaration.

SECONDLY, Then we lay it, that the hundred guineas are *valoris* 107l. 10s. of which you must take notice, for it is a coin by itself, and is not any noted money or coin of the kingdom, as the twenty-shilling pieces are, for there is no proclamation to make them pass; but a guinea is in nature of a medal, and is more like a foreign coin, and is much of that nature. And there are several declarations of so many dollars *valoris* so much, and yet you know the value of a *dollar*: this is like that, which you cannot take notice of, because it is not the current coin of the kingdom.

(a) Cro. Jac. 253. Moor, 641. 2. Sid. 88. Lutw. 734. 1. Salk. 162. 197. 227. 2. Salk. 676. 6. Mod. 306.

(b) See Hill v. Pheasant, 2. Mod. 54. and Edgebury v. Rossender, 1. Lev. 94.

(c) By 13. Geo. 2. c. 19. s. 9. all games played with dice, except the game

of *back-gammon*, and games played with *back-gammon* tables, are declared illegal; and therefore it is decided that no action will lie on a wager respecting the mode of playing *HAZARD*, that being an illegal game. Brown v. Leeson, 2. H. Bl. Rep. 43.

* **HOLT, Chief Justice.** Guineas were coined at THE MINT for twenty shillings only, and there was never any proclamation to make them pass, though there was one to take the twenty-shilling pieces. It is true, by consent they may pass for more than twenty shillings, but legally no more is to be demanded for them than twenty shillings. The guinea was coined according to the twenty-shilling piece; we call them guineas by agreement; but how can we take notice of what value they are? If the plaintiff had declared of twenty-shilling pieces, we must have judicially taken notice of them: but do you think that it is not high treason to counterfeit guineas? Certainly it is; though the indictment shall not run for counterfeiting guineas, but of so many pieces of twenty shillings value. A guinea is the current coin of the kingdom, and we are to take notice of it. The guineas were coined after the proportion of *Carolus's* (that is) sixteen penny-weight less, to the value of twenty-shillings only: the question is, Whether we can take notice of the allegation of the value of guineas, because there are other sorts of them, as five-pound guineas? Where you declare on a *foreign coin*, you must declare in the *detinet* only, and not in the *debet*: so in an action of debt for goods, as corn, &c. though DEBT lies on the contract, yet it must be in the *detinet* only, and the value must be shewed: it is always so, unless the debt be for *English money*. Now these are called *guineas* here, which if it were a coin not known in our law, we must take them to be as goods.

EYRE, Justice. Then the defendant confesses the value of them, as the plaintiff has alledged.

HOLT, Chief Justice. But it is *centum nummos aureos ANGLICE* "guineas." What is that? It is very uncertain indeed: If it had been *centum pecias auri vocat.* "guineas," it had been well enough.

Adjournatur.

But in *Trinity Term*, in the seventh year of *William the Third*, (**HOLT, Chief Justice**, and **Justice EYRE** only present) the judgment was reversed, chiefly for this reason, Because the plaintiff had shewed the case, play, and wager, and then the deed by which the parties bound themselves "*in pignoratione præd.*;" and, upon oyer of the deed, it appeared, that it was to stand to the judgment of THE GROOM-PORTER upon the "case stated and signed by us "both," which is not the same: and therefore the writing comprehending the case and averment taken, that the case in this and in the * declaration are all one, and although that the inducement of the case and this stated are all one, and therefore whether the averment be before the deed or after is not material.

Yet THE CHIEF JUSTICE was of another opinion, because the declaration supposes the deed to be, to perform a wager comprised in the deed, where it is to perform a case extrinical, and which is to be coupled by averment.

POPE
against
ST. LEGER.
Vide 2. Salk.
446.
Ante, 5.
1. Salk. 9. 22.
25.

How to declare
on foreign coin.

Ante, 5.
8. Mod. 37.
127.

Variant between the declaration and the writing on which the action is brought.

Cowp. 178.
3. Term Rep.
351.
4. Term Rep.
561.

Cafe 4.

Waytes against Briggs.

In an action of debt on an escape, a declaration that the defendant was committed, &c. is good, without saying *prout patet per recordum*, for being inducement it need not be averred.

S. C. 2. Salk. 565.
S. C. Holt, 613.
Hob. 210.
Moor, 888.
1. Sid. 216.
3. Lev. 137.
1. Show. 4.
6. Mod. 103.
1. Salk. 298.
3. Lev. 393.
Comb. 299.
5. Com. Dig. "Pleader" (C. 82.).
2. Bac. Abr. 247.

THIS IS AN ACTION OF DEBT ON ESCAPE. It is said, that the prisoner was brought before MR. JUSTICE GREGORY, and by him committed. It has been objected, because we do not conclude *prout patet per recordum*.

HALL. I conceive this is good on a general demurrer, and that it is within the 27. Eliz. c. 5. of demurrers, because it is but matter of form, and is within the rule laid down in *Hob. 233.* and within the reason of it too; and on the trial the commitment must have been given in evidence. The case of *Hancock v. Proud (a)* is in point: In debt on bond against executor, the defendant pleads several judgments in bar, *ultra quod, &c.* and the plaintiff replies, *quod placitum præd. est minus sufficiens* to bar him, because upon one of the judgments (naming it) satisfaction is acknowledged; and as to the others kept on foot by fraud; *et hoc paratus est verificare*, without saying *per recordum*: and, by the Court, it is good on a general demurrer; otherwise upon a special demurrer; and judgment was for the plaintiff.

HOLT, Chief Justice. It seems but matter of form, and so it was adjudged twice in the case of *Hancock v. Proud*, in 1659, and *Clegat v. Banbury (b)*.

EYRE, Justice. The alledging of the commitment is but inducement, and not the point of the action. I think the case of *Middleton v. The Manucaptors of Silvester (c)* is in point, and this is but matter of evidence (d). Where the record is the substance of the plea, there it must conclude *prout patet per recordum*; but where it is but inducement, it need not; for which there is a good difference in *Co. Lit. 303. a.* Where a matter of record is the foundation or ground of the suit of * the plaintiff, or of the substance of the plea, there it ought to be certainly and truly alledged; *aliter* where it is but conveyance; and so in this case.

* [9]

2. Saund. 9. 10.
268, 269.
3. Salk. 520.
565. 630.

HOLT, Chief Justice. In debt on a judgment, it is said, *quod cum recuperasset, &c.*; and though it is not said *prout patet per recordum*, yet it is good, and so it has been held; for it was but inducement; and yet it is agreed, that in such case the defendant may plead *nul tiel record*. THE ESCAPE is the gift of the action, and THE COMMITMENT is but the inducement to it, though it can be no escape without it. The record is not the matter of the action; but the escape; for if the record had been the matter of the action, then the plaintiff ought to have concluded *prout patet per recordum*; but here the omission of it is but matter of form, for it ought to have

(a) 1. Sid. 429. S. C. 1. Saund. 336.
(b) 2. Sid. 16.
(c) 1. Sid. 216.
(d) So in an action against the sheriff for the escape of a prisoner, on *mesne*

process, whether there was a good cause of action against the party who escaped is matter of evidence; and therefore unless it be proved, the plaintiff will be non-suited. *Alexander v. Macauley*, 5. Term Rep. 611.

been

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been given in evidence on "*nil debet*" pleaded, which is the plea for the defendant in this case, because *the gist* of the action is grounded on matter of fact, and not on the record; for if it was, then the plaintiff could not plead "*nil debet*" to it, but only "*nul tiel record.*"

WATTS
against
BATHURST.
Carth. 145.

EYRE, *Justice*. The defendant is not estopped to say *quod* the prisoner *non fuit* committed, though it be said on the record *quod committitur*.

HOLT, *Chief Justice*. The record is only alledged to make it an escape; and though the record be proved, that does not make it an escape only.

NORTHEY. In last *Hilary Term* in the court of common pleas in debt on escape, it was not said *prout patet per recordum*, and the Court on the first argument were of opinion, that judgment should be given against the plaintiff; but afterwards considering that the defendant's plea had admitted the commitment, judgment was given for him.

CURIA. That case is no authority for you.

Judgment for the plaintiff, *nisi, &c. (a)*.

(a) By 4. & 5. Ann. c. 16. "where any demurrer shall be joined in any action, in any court of record, the Judges shall proceed and give judgment without regarding any imperfection, omission, or defect in any writ, return, plaint, declaration, or other pleading, &c. except those specially set down in the cause of demurrer,

"notwithstanding the same might have been taken to be matter of substance, and not aided by 27. Eliz. c. 5. and no advantage shall be taken of or for the not alledging *prout patet per recordum*, except the same be specially and particularly set down, and shewn for cause of demurrer."

The Earl of Bath against Batherlea.

Case 5.

TREVOR, *Solicitor General*. The depositions which were read against my Lord Bath in the other cause, are no evidence in this, because that trial is not between the same parties; and depositions are never evidence but where they are mutual; and this defendant does not claim under any one that was party to the former suit.

Depositions in one cause, where they are evidence in another, or not.

CURIA. They may be read because the defendant shelters himself under the other's title, and the title of the land is not in question, but the question is to whom the rent shall be paid.

2. Chan. Cases, 250. 3. Mod. 181. 1. Vern. 53. 161. 254. 308. 366. 413. 555. 603. Comp. 17. 594.

If the * defendant give the plaintiff's answer in chancery in evidence, he may insist only to read such part as he will, for it is like examination of witnesses; but then the other side may insist to have the whole read after.

have the whole of it read.—Chan. Cas. 154. Comp. 594. 4. Com. Dig. (C. 3.). Bull. N. P. 237. Espinasse Digest, 752. Gilb. L. E. 50.

1. Salk. 278. 281. 286. 2. Salk. 555. 691. Post. 277. 1. Chan. Cases, 73. 175. 236. 2. Vern. 517.

* [10]

The party against whom an answer in chancery is produced in evidence, may

NOTA,

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THE EARL OF
BATH
against
BATHURST.

NOTA, There was a verdict for the plaintiff in this cause after a trial from nine o'clock in the morning till nine the next day; and the Judges sat up all night long.

Cafe 6.

The King against the City of Chester.

A return, to a mandamus to restore a common council man, that they were chosen yearly, and that before the coming of the writ they were chosen and continued for a year, and at the end of the year were duly removed from their offices by the election of others, is bad for its uncertainty; for it ought to have shewed the time they were elected, so as it might have appeared they were not removed before the year expired.

S. C. Comb. 307.
S. C. 3. Salk. 230.
B. C. Holt, 438.
Foss, 256. 275.
1. Show. 258.
281. 364.

* [11]
2. Salk. 428.
433, 434, 435.
Carth. 170.
6. Mod. 18.
1. Salk. 433.
456.
8. Mod. 309.
5. Com. Dig.
"Mandamus"
(D. 5).
3. Bac. Abr.
542. 543.

THIS was a mandamus to restore nine persons to their places of common-councilmen in Chester.

They return, that by charter granted to them in the twentieth year of Henry the Seventh, amongst many other things of which they take no notice, they are impowered to choose forty common-councilmen yearly, and that ante adventum of this writ, these nine persons were chosen common-councilmen, and so continued for a year; and that at the end of the year debite amoti fuere ab officio per electionem aliorum.

SIR THOMAS POWYS. This is no good return, because it does not set forth any certain time when these persons were chosen or removed; and in returns to mandamus's, there ought to be the greatest certainty, because it is the ground of the judgment of the Court, and are to conclude the party, who has no opportunity to plead to them, and therefore they must be positive too, that if they be false, the party may have his action. Now to say, that these nine persons were ante unum annum integrum ante adventum brevis chosen and removed, is altogether uncertain; for it may be forty years ago, and yet the return be true; and if we bring an action on this return, we cannot know what certain time they meant.

SECONDLY, They say, that the year being ended, debite ab officio amoti fuer. which is not good (a); for it ought to be direct and positive: "Non fuit debito modo admissus" is an ill return of a mandamus; it ought to be non fuit admissus. H. brought a mandamus to be restored to the place of town-clerk of Hereford; the mayor returned, nunquam fuit debito modo admissus; and held ill; he ought to have returned non est admissus; for if the return be false, the party grieved may have his action on the case.

* CURIA. The case of amotion, or putting out, differs from the matter of election. There is a difference between debite amotus fuit, and non fuit debite electus; for this case and all others of like nature admit that he was removed; but in case of election the mandamus is to admit him, and therefore in the return it must be shewed non fuit electus positively, and must not say non fuit debite electus, for that implies an election; but it was not according to the constitution of the corporation, and therefore in such case the return ought to have shewed how he was elected. But in this case all are agreed that he was removed, and they say that it was duly done, and shew the reason of it. But the return ought to have shewed what time they were elected.

(a) 1. Sid. 209.

Michaelmas Term, 6. Will. & Mary, In B. R.

EYRE, *Justice*. They may alledge a custom to choose a *common-councilman*, and to turn him out *ad libitum*, and that is *Warren's Case (a)*; for he has no freehold in his place, as an *alderman* has; for a common-councilman is collateral to the corporation.

HOLT, *Chief Justice*. The return is too short. But we will not restore you on this writ: agree to take a declaration, and try it next Term on the merits.

And here you ought to have brought several *mandamus's*; for nine persons cannot join in a *mandamus* as here; perhaps you were chosen at nine several times. You cannot all join in one writ, for the election of one is not the election of another. This is an innovation, to join nine men in one writ of *mandamus*: can we grant a joint restitution to them? It is a several interest. *Tenants in common* cannot join in one action, though they come in by one feoffment (*b*); the motion of the one is not the motion of the other; and it may be for several faults, one for forfeiture, the others for other reasons. I think the writ ought to be quashed (*c*).

EYRE, *Justice*. And so do I.

THE KING
against
THE CITY OF
CHESTER.

If several *common-councilmen* be removed, they cannot all join in one *mandamus* to be restored; but each must have a separate writ.

S. C. 1. Salk.
436.
Post. 430.
2. Inst. 197.
4. Bac. Abr.

663. 5. Burr. 2742.

(a) Salk. 430.

(b) But see 1. Lev. 109. Ray. 70.

(c) See the Case of Andover, 2. Salk. 433; and Rex v. Mayor of Hull, 9. Mod. 210. accord.; Rex v. Mayor of

Kingston, Stra. 578. But see Rex v. Mayor of York, 5. Term Rep. 74; where it is said, that after a return had been made to a *mandamus*, it is too late to make any objection to the writ itself.

Green against Moore.

THE case was thus:—The declaration was in *Trinity Term*; the defendant imparls till *Michaelmas Term*; in the vacation the plaintiff was outlawed; and then in *Michaelmas Term* the defendant pleads the outlawry *in bar*, but does not say the outlawry was *puis darrein continuance*; upon this the plaintiff demurs.

An executor may, after declaration and imparlance, confess judgment and then plead this *in bar*, and need not say *puis darrein continuance*, as in *Savil's Case (a)*. So here the plea of outlawry after imparlance is good, without saying *puis darrein continuance*, for it appears to be so here. So *Mich. 3. Will. & Mary, Roll. 395*.

E contra. In the case of *Surby v. Gile (b)*, an outlawry was pleaded after imparlance, but because it was not said *puis darrein continuance*, the plea was disallowed. So in the case of *Ewer v. Moyle (c)*, it is no good plea to say *post darrein continuance* such a thing happened; but ought to be precise in the day.

(a) Jones, 299.

(b) Trin. Term, 35. Car. 2. Roll. 1112.

(c) Yelv. 141.

* [12]
Case 7.

If the plaintiff be outlawed after the defendant imparls, he may plead the outlawry in disability without saying *puis darrein continuance*.

S. C. 1. Salk.
178.
2. Vent. 282.
Lut. 1514.
1. Lutw. 39.
N. Lutw. 15.
2. Lutw. 1512.
1514.
Comb. 253-357.
4. Bac. Abr.
144.
5. Term Rep.
224.

HOLT,

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GREEN
against
MOORE.

HOLT, *Chief Justice*. The plea is good enough.

EYRE, *Justice*. Since the record appears, why should it not be pleaded?

BUT PER CURIAM, Let it go over till the next Term, because it being a just action, you may in the mean time reverse the outlawry, and then may plead *pais darrein continuance*.

Case 8.

The King against Lammas.

While law proceedings were in *Latin*, the return of a conviction on a penal statute, though in *English*, was good.

3. C. 1. Salk.
349.

3. C. Comb. 326. Comb. 212.

In an information on a penal statute, it is sufficient to say that the defendant is convicted "of the said offence, &c."

* [13]
3. C. Skin. 562.

NORTHEY moved to quash an indictment for selling low wines in a cellar, without giving notice to THE EXCISEMAN, against the statute of 3. & 4. Will. & Mary, because it is returned in *English*, and ought to be in *Latin*.

HOLT, *Chief Justice*. I cannot tell that; no writ of error lies on it; the remedy is by appeal. You may as well take this exception to an order for keeping a bastard-child; though indeed all convictions for deer-stealing are in *Latin*.

NORTHEY. Then the conviction is not according to the indictment and the statute, because they do not find that he is a *common distiller*, as the words of the statute are; for if another person distil wines, a man may sell them in a private cellar without offending the statute.

* CURIA. They convict him of "the offence aforesaid," which must be as he was a *common distiller*.

Case 9.

The King against Wadsworth.

The Court will not quash an indictment for extortion.

1. Vent. 370.
1. Sid. 54.
1. Salk. 372.
1. Will. 325.

3. C. 1. 1088. 3. Burr. 1127. 3. Burr. 1468. 1841. Andr. 230. 4. Com. Dig. "Indictment" (H.). 3. Bac. Abr. 745.

COUNSEL moved to quash an indictment against a miller for taking too great toll, because it was not said *jurat*. nor *onerat*. nor the jurors named.

THE COURT. It is against the course of the court to quash an indictment against a person for extortion or oppression; we cannot do it. Demur to it.

Case 10.

Walker against Walker.

A general *indebitatus assumpsit* will not lie on a wager to recover the money from the loser; but if the stakes be deposited, it lies by the winner against the stakeholder.—3. C. Comb. 303. S. C. 12. Mod. 69. 238. S. C. Holt, 328. Ante, 5. Pitt, 351. 2. Vent. 175. 3. Lev. 118. 4. Mod. 409. 6. Mod. 128. 1. Salk. 22. 125. Skin, 196. Comb. 303. 2. Bac. Abr. 15. 620. Fitzg. 302. Cowp. 37. 1. Term Rep. 616.

COUNSEL moved in arrest of judgment, because the action was for money won at play on a wager, by a general *indebitatus assumpsit*, which is not a good promise in law; for there is

Michaelmas Term, 6. Will. & Mary, In B. R.

no debt (a), and the verdict being general, and entire damages given, it cannot be good. There are cases on both sides; and the point is now depending in a cause in the exchequer chamber.

WALKER
against
WALKER

E contra. Though it is, yet in the case of *Egleston v. Lewen* (b), in *Hilary Term*, in the thirty-third and thirty-fourth year of *Charles the Second*, in SIR FRANCIS PEMBERTON'S time, a judgment in this point was affirmed.

HOLT, *Chief Justice.* It was so; but since we came hither we have held the contrary, that it does not lie: it is merely a wager, and no *indebitatus assumpsit* lies for it; for to make that lie, there must be a work done, or some meritorious action for which debt would lie; but it does not for this wager, because this is due in a collateral respect: it is true, the cast of a die alters the property if the money be staked down, because it is then a gift on condition precedent, and an *indebitatus assumpsit* lies against him that holds the wager, because it is a promise in law to deliver it if won (c). If a man say to a surgeon, "Cure such a man and I will pay you," a good *assumpsit* lies upon that, because it is an original contract, and there is a labour done in the way of his profession (d). No *indebitatus assumpsit* lies on a bill of exchange, and a judgment was stayed on that point in my LORD HALE'S time (e), and the like in the exchequer (f); and it is not material, whether he against whom the bill is drawn, has effects * in his hands when he accepted the bill, or not (g). It is not like a *liberate* to pay money on a tally; when the officer has the money, the propriety of it is vested out of the king, and is in the party (h). I am sure my LORD CHIEF JUSTICE POLLEXFEN was of opinion, that that judgment in *Egleston v. Lewen* (i) was not well affirmed.

* [14]

Let it stay; we will speak with the Judges in THE EXCHEQUER CHAMBER. After this verdict, if it could be any ways made good, we would do it; but a verdict cannot make that good which is bad in law (k). Though, on the loss of the wager, the defendant had promised the next day to pay it, yet an *assumpsit* would not lie on it (l), because it wants consideration, it being but executory.

Adjournatur (m).

(a) See Cowper, 38.

(b) 1. Lev. 118.

(c) See *Sands v. Trevilian*, Cro. Car. 107. 193.

(d) 1. Salk. 27. Bull. N. P. 280.

(e) 1. Salk. 125. 1. Mod. 285.

(f) 12. Mod. 37. 1. Vent. 451.

(g) See Kyd on Bills, 100.

(h) Post. 48.

(i) 1. Danv. 28. p. 12.

(k) See 5. Bac. Abr. 296.

(l) 4. Mod. 409.

(m) It is said 5. C. 12. Mod. 258. that in Michaelmas Term 10. Will. 3. judgment was given for the defendant. See also Lutw. 180.

HILARY

1. The first of these is the fact that the Government has been unable to secure the necessary funds to carry out its policy of maintaining the value of the pound at its pre-war level. This has been due to a variety of factors, including the fact that the Government has been unable to secure the necessary foreign exchange to finance its policy.

[illegible]

I think that we will have to wait until the summer months, when the weather is more favorable, before we can start our work.

1. The first part of the document is a list of names and their corresponding dates. The names are listed in a column on the left, and the dates are listed in a column on the right. The names are: John Doe, Jane Smith, and Bob Johnson. The dates are: 1990, 1991, and 1992.

12

HILARY TERM,

The Sixth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Giles Eyres, Knt.

Sir Samuel Eyres, Knt.

} *Justices.*

Sir Edward Ward, Knt. Attorney General.

Sir Thomas Trevor, Knt. Solicitor General.

* [15]

• The King against Crosby.

Case 11.

CROSBY was indicted for *High Treason*; and at a trial at *Quere*, Where bar Aaron Smith was ready to give evidence against the prisoner, when he produced the record of Smith's conviction and judgment to stand in THE PILLORY, and he had stood in it. ther a person convicted and set on the pillory as the author of an infamous libel, is thereby rendered an incompetent witness.

THE COUNSEL for the prisoner objected, that this made him infamous, and disabled him from being a witness.

WARD, *Attorney General*. This does not take away his evidence: the cause for which he was convicted was only giving instructions to Stephen Colledge to be used by him at his trial; but there was no publication of them, and it was not a cause that deserved THE PILLORY.

HOLT, *Chief Justice*. The cause is not material if the court had a jurisdiction; if he stood on the pillory, and suffered an infamous punishment, the question is, whether he be a good witness.

TREVOR, *Solicitor General*. It is not the putting in the pillory, but the fact for which he was convicted that takes away his evidence; as perjury, and not a libel only, as here.

S. C. Skin. 578.
S. C. 2. Salk, 689.
S. C. Holt, 753.
S. C. 12. Mod. 72.
Post. 75.
1. Hale, 304.
Gillb. L. E. 140.

HOLT,

THE KING
against
Crosby.

HOLT, Chief Justice. It is the infamous punishment, and not the cause (a).

A pardon operates as a charter of reformation, and removes the infirmity resulting from being set on the pillory for an infamous offence. Post. 75.

3. Lev. 427.
Kely. 37.
Raym. 369.
3. Peer. Wms. 457.
2. Hawk. P. C. ch. 33. f. 129.
ch. 37. f. 48.
ch. 46. f. 19.
1. Hale, 278.
Gillb. L. E. 142.
Skin. 578.

If one is convicted of perjury, and stands in THE PILLORY for it, if he get a patent of pardon, it does not restore him to his *liberam legem*. Here has been a general pardon; the pardon does not revive his old credit, but it gives * him a new one. If one attainted of treason be pardoned, it makes him a good witness, though before the pardon he could not be so; but where a man lies under a civil disability, without any conviction, the king cannot pardon that; but where there is a conviction for a criminal offence, the king can, though not to restore him, but to give him credit for the future. This is the same disability as is on a judgment in villenage or attainder, and it is every day's practice to allow them to be witnesses after pardon; the disability is as much a consequence on one as the other, and the general pardon dischargeth the offence. I will not give any opinion now as to the first point, Whether he had been a good evidence without a pardon? But I take it, that the general pardon makes him a good one, and has taken off the disability; for it not only takes away the crime, but the disability too (b). And by EYRE, Justice, he was allowed to give evidence.

But the jury acquitted Crosby.

(a) It is said, in the case of Pendock v. Mackender, to be now settled, that it is the crime that creates the infamy and takes away competency, and not the punishment, 1. Will. 18. See also Davis v. Carter, post. 75. The party himself may be examined as to the fact, Pridde's Case, Cases in Crown Law, 2d edit. 349; and perhaps the Court will infer

the infamy of the crime from the nature of the punishment; for if a witness, on being asked the question, admit that he has stood in the pillory, the Court will not permit him to become bail. Rex v. Edwards, 4. Term Reps. 440.

(b) See the case of Cuddington v. Wilkins, Hob. 67. 82; Reilly's Case, Cases in Crown Law, 2d edit. 362.

Case 12.

Walker against Slackoe.

If THE CURSITOR, in making out a writ of error on a judgment against five, omit to state, in pursuance of the note from THE ATTORNEY, that one of them is dead, yet it cannot be amended.—S. C. Post. 69. S. C. Comb. 354. S. C. Carth. 367. S. C. Holt, 54. S. C. Ld. Ray. 71. 1. Salk. 49. 52. 6. Mod. 263. 310. Carth. 510. Skin. 165. 253. Comb. 5. Fitzg. 101.

THE NOTE from THE ATTORNEY TO THE CURSITOR was thus: "Inter A. in trespass, and five, naming them, defendants. [NOTE, E. one of the defendants is dead: make "out a writ of error."] The cursitor omits to say that he is dead, and takes no notice of him, but makes it out in the name of four only.

CARTHEW. This is not like *Blackmore's Case* (b), for this is an error in judgment, which is not amendable; and there is no case comes up to this.

(b) See the case of *Blackmore's Case*, 1. Salk. 49. 52. 6. Mod. 263. 310. Carth. 510. Skin. 165. 253. Comb. 5. Fitzg. 101.

(c) 8. Co. 156.

HOLT,

Hilary Term, 6. William & Mary, In B. R.

HOLT, *Chief Justice*. I will tell you one (a). In debt on a bond against an heir where he was bound, THE CURSITOR made out a writ, wherein he did not express that the heir was bound, as perhaps thinking him bound without it; yet after verdict it was amended and put in; which was an error in his judgment, and yet amendable, because he had the bond before him. In this case before us the notes were as large to THE CURSITOR as need to be.

WALKER
against
SLACKER.

NORTHEY. In the case of *Powel v. Brazen-Nose College* (b), the writ was, "PRÆCIPE quod reddat twenty acres *Hedington*," the word "in" being omitted; and it was amended, it being only the default of the clerk; for he had writ it out of a paper delivered to him to make the writ, wherein this word "in" was, which THE CURSITOR confessed upon oath, though this was an original: and our case is the same with *Blackmore's Case*, for THE CURSITOR is to draw the writ, and THE ATTORNEY is only to state the fact to him, and here was as full instruction to him as could be,

* [17]

At another day,

HOLT, *Chief Justice*. The defendant here is not party to the writ of error; for if the defendant die before *non est erratum* pleaded, you shall go on (c).

(a) *Forger v. Sales*, Cro. Car. 147, 148.

(b) Cro. Eliz. 644.

(c) This case was moved again in Michaelmas Term 7. *Will.* 3. and the writ of error was quashed; the Court being of opinion, that it was not amendable, because it was a writ to reverse a judgment, and the statutes of amendment extend only to amend writs which support judgment. 5. C. Post. 69.

But by 5. Geo. 1. c. 13. "all writs of error wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record by the respective courts where such writ shall be made returnable." See *Lady Cais v. Title*, Stra. 682.; *Sword Blade Company v. Dempsey*, Stra. 892.; *Verelst and Smith v. Raffael*, Cowp. 425. and 1. Bac. Abr. 95. 105.

Herbert against Morgan.

Case 13.

FORMEDON IN REMAINDER. The plaintiff intitles himself to maintain the action, for that the *issue in tail* is dead without issue, and says not, that *tenant in tail* is dead without issue.

In a FORMEDON in remainder, it is not enough to say, "the issue" is dead with-
"out issue," but it must be averred that "the tenant in tail" died without "issue."

LEVINZ, *Serjeant*. This *formedon* does not intitle the plaintiff to maintain his action; for it is not enough to say, that the *issue* is dead without issue, but also, that the *tenant in tail* is so. That is the very title of the demandant; and it shall never be intended that he died without issue; for the estate was a fee simple at common law; and, now it is an estate-tail, it is supposed it will endure for ever, and the plaintiff must always set forth as much as will entitle him to his action; and the intendment is strong against him here, because the law supposes the estate-tail will continue for ever;

Lut. 961, 962.
N. Litw. 305.
309.
Hob. 132.

1. Mod. 219.
2. Bac. Abr. 521.

Hilary Term, 6. William & Mary, In B. R.

HERBERT
against
MORGAN.

and if the tenant in tail be not dead without issue, the demandant can have no title, though his issue be dead without issue, and therefore is not to be received (a). And let me admit what I will, if the plaintiff have no title he shall never recover. *Buckmer's Case* (b) is in point.

HOLT, *Chief Justice*. It is a *FORMEDON in remainder*, because it remains over on the determination of the estate-tail: and must not you shew that the *tenant in tail* is dead without issue according to the limitation, for without that you can have no remainder? It is the very point of the action, and you must shew that the first donee is dead without issue; and * it is not implied at all that because *the issue* is dead without issue, that therefore the *tenant in tail* is; for he may have other sons besides his eldest. Suppose it be a *condition precedent* that when *A* is dead without issue the remainder shall be to *B*. in fee, it will not be sufficient to aver, that the son of *A*. died without issue, but also that *A*. is dead without issue: and this is in nature of a *condition precedent* before the remainder can come in possession.

(a) Fitz. N. B. 220. The Register, Book 8. *Edw.* 3. pl. 19. 38. *Edw.* 3. 242. The Year Book 3. *Hen.* 4. pl. 1. a. pl. 26. Hob. 51. 282. Bro. Abr. "Formedon," pl. 21. (b) 2. Co. 86. 2. Brownl. 274. Rastal. Ent. 364. a.—See also Year 1. Leon. 213.

Case 14.

The King against Wood.

Obtaining goods upon a false pretence is not indictable at common law, unless it be of a public nature.

AN INDICTMENT set forth, that *J. J.* having seventeen yards of silk, *Wood* deceptively told him, that a young woman had occasion for it to make her wedding-clothes; on which he sold it to her under colour of that false pretence.

MONTAGUE moved to quash it,

S. C. 1. Self. Cases, 277.

FIRST, Because no indictment lies for this matter, for there was no trust; and if there were any, an action lies for it (a).

1. Salk. 150.

379. 6. Mod. 42. 61. 105. 301. 311. 2. Ld. Ray. 1013. 7. Mod. 40. 2. Bac. Abr. 611. Fitzg. 182. Cowp. 323. 1. Bl. Rep. 273. 1. Term Rep. 581. 3. Term Rep. 98.

An indictment for a fraud, omitting the *ubi reuera*, &c. is bad.

SECONDLY, It is not averred, that the young woman did not marry, or that she had not occasion for it.

PER CURIAM. Let it be quashed.

(a) By 30. Geo. 2. c. 24. obtaining goods by false pretences is an indictable offence. But see 1. Hawk. P. C. ch. 71.

Case 15.

The King against Grove.

Defendant in barratry must have a note of particulars.

PER CURIAM. In an indictment for barratry the defendant must have a note of the particulars, that he may know how they intend to charge him, otherwise they will not proceed to trial.

1. Mod. 288.

6. Mod. 261. 311. 1. Sid. 282. 1. Hawk. P. C. ch. 81. f. 13. 1. Bac. Abr. 281. 1. Ld. Ray. 470.

Anonymous.

Hilary Term, 6. William & Mary, In B. R.

Anonymous.

Case 16.

PER CURIAM. If a special matter be pleaded which looks like the *colour* of a plea, but amounts to the *general issue*; it is no cause of *demurrer*; as if in debt you plead *a release*, though you might have given it in evidence on *nil debet*, yet it is no cause of *demurrer*: so in debt for rent, if you plead *entry and expulsion*, it is no cause of *demurrer*, though it may be given in evidence on *nil debet*.

Where matter, though amounting to the *general issue*, may be *specially pleaded*.

Anonymous.

Case 17.

NOTE, After *demurrer* joined we cannot give leave to the defendant to waive his *demurrer* and plead the *general issue*; and here the *demurrer* is entered on THE ROLL. It is a record of court when it is brought into court, and put into THE PAPER to be read as a record.

After *demurrer* joined, the defendant shall not waive, and plead the *general issue*.

6. Mod. 38. 2. Salk. 513.

1898

Annexation

The United States, in 1898, acquired the Philippines from Spain. The acquisition was the result of the Spanish-American War, which ended with the signing of the Treaty of Paris. The United States then established a colonial government in the Philippines, with the United States Army and Navy as the primary forces of administration. The United States also established a civil government, with the United States Civil Service as the primary force of administration.

1901

Annexation

The United States, in 1901, established a civil government in the Philippines. The civil government was established by the United States Civil Service, which was the primary force of administration. The United States Civil Service was established by the United States Congress, which passed the Philippine Civil Service Act in 1901. The United States Civil Service was established by the United States Congress, which passed the Philippine Civil Service Act in 1901.

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E A S T E R T E R M,

The Seventh of William the Third;

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

* The King against Bethel:

[19]
Case 18.

BETHEL was convicted at THE OLD BAILEY for buying of broad money, and was fined a thousand pounds. Being arrested at the suit of a private person some time before his prosecution for that offence, or before any knowledge of it, and two persons being bail for him in the king's bench; he moved for a *habeas corpus*, and was brought up by the keeper of NEWGATE.

It was moved in behalf of his bail; that he; being now in court, might, as he also desired, surrender himself in discharge of his bail, and be committed to THE MARSHALSEA.

CURIA. You cannot discharge the king's prisoner without leave of the Court; it was denied in *Clayton's Case*. We know very well the meaning of turning him over to THE KING'S BENCH PRISON.

S. C. 12. Mod. 741. S. C. 1. Ld. Ray. 47. 1. Salk. 149. 1. Mod. 118. 184. 2. Jo. 13. 1. Keb. 322. 1. Sid. 78. Style, 147.

A prisoner in NEWGATE for a fine cannot surrender in discharge of his bail in a civil action without leave of the Court, although the arrest was previous to his being apprehended for the same.

S. C. Salk. 343. S. C. Holt, 145.

A return to a *habeas corpus*, that the prisoner was committed to the custody of the gaoler, "safely to be kept in custody by virtue of a certain order of the court of sessions at THE OLD BAILEY, the tenor of which order is in the words following, viz. that A. B. is known to have exchanged broad money for clipped, therefore it is considered by the Court, that the said A. B. pay 1000l. for a fine, and remain in the gaol of NEWGATE until, &c." is *informis*, inasmuch as THE WARRANT does not shew that he was committed for the fine; yet as, upon the whole return, there appears a good cause of commitment, it is sufficient.

Post. 83.

March, 52.

Vaugh. 135.

Comb. 125.

1. Mod. 119.

134.

Fort. 272.

Stra. 915.

2. Term Rep. 255.

584. 2. Hale, 144.

SIR B. SHOWER. Then we hope we shall be discharged on these exceptions to the return.

It does not appear by the return that there was any commitment of *Bethel*; it says, he was committed *virtute ordinis qui sequitur*, which was, that being convicted and fined a thousand pounds, *remaneat in custodiâ gaolæ de NEWGATE quousque, &c.* Now it ought to have said, that he was in execution before, and that then he was charged for this fine, or that he was present in court and committed by the Court for the fine, as it ought to be where the commitment is by commissioners of *oyer and terminer*. And we are at liberty to take these exceptions on a return to a *habeas corpus*, as well as on a writ of error (a).

* NORTHEY *ad idem*. The order is only the judgment of the Court, which is, that he should be taken; yet there must be process for that, as there is a *capias pro fine* here. The judgment is no commitment, but there must be a process; so that here does appear no cause of detention of *Bethel*, because it does not appear he was in custody before, or that being in court he was committed by them for this fine.

WARD, *Attorney General, contra*. In returns by an officer, if there appear a sufficient cause of detainer, though not of his caption, yet it will be sufficient (b); for the complaint is, that he is in prison for a cause that is not lawful; and here the keeper returns, that here is a judgment against *Bethel* and a fine, and that he is in prison for that cause, which is a sufficient signification of the cause, though it be not expressly said *quod committitur*.

TREVOR, *Solicitor General*. Though the return be not so formal as it might have been, yet it is good in substance, for the order is a sufficient judgment of a *committitur*; for the *remaneat* may as well go to his putting in prison as his continuing there if he was there before, and amounts to a new commitment of him for this offence and fine.

LOVEL, *Serjeant*. This is only the certificate and return of the gaoler, and not the words of the judgment of record; it is not traversable, but must be taken for truth, which answers the intent of the *habeas corpus*.

COWPER. It appears, that *Bethel* was committed by sufficient authority, by commissioners of *oyer and terminer*, which is in court. — Then here a sufficient cause of commitment appears on conviction and fine of a thousand pounds, and this is no return of the judgment; which if it be so as here, it is erroneous; but they cannot take advantage of it now; here is only returned the cause of detainer and commitment to prison: In *Bushel's Case* there was no sufficient cause of commitment. Returns need not be so

(a) *Bushel's Case*, Vaugh. 135. S. C. 1. Mod. 119. 134. S. C. 2. Jones, 13.
(b) 1. 51 d. 78. 143. 1. Keb. 146. 395. 514.

Easter Term, 7. Will. 3. In B. R.

certain as other things; it is sufficient if the words imply as much as will make the detainer lawful; that is here by *remaneat*, which could not be unless he had been in prison before.

THE KING
against
BETHEL.

* *SHOWER contra.* It had been sufficient if he had returned *quod commissus fuit per commissioners deoyer et terminer*: but if he return the order, and that appears not to be sufficient or not good, the prisoner shall be discharged; for the judgment is not a commitment, and, for aught appears, a stranger might have taken him up and carried him to NEWGATE. I agree, that this return does not require so much certainty as returns to a *mandamus*, yet a sufficient commitment and cause of it must appear.

[21]

HOLT, *Chief Justice.* This is a case of consequence, and the return of it is *primæ impressionis*, the first precedent. The commitment ought to be to the sheriff, or generally *quousque* he paid the fine. It is true, justices of the peace commit felons to the keeper of the prison; but where the Court commits, it is to the sheriff, who is their officer, to whom the Court must award a *capias*, and not to the keeper. It is true, a *habeas corpus* lies to any person as well as the gaoler, but then here he ought to return specially, that he was committed to the sheriff for the fine, and is now in the gaol of NEWGATE under his custody.

1. Sid. 244.
1. Keb. 508.
2. Hawk. P. C.
ch. 16. s. 15.

Then as to *the remaneat*: Suppose he was wrongfully in custody before, no one but the proper officer can take him. If a judgment be given against a man, any of the courts of *Westminster-Hall* may send a tipstaff to take him in view of the court, but they could not do so if they heard that he was at *Charing-Cross*.

Then you cannot stop a lawful detainer on a wrongful commitment, and you must satisfy us by the return that he was lawfully in custody. There ought not only a good cause to appear, but also a good commitment, both as to the manner and substance of it; for the writ requires *causam captionis et detentionis*, and here is only the cause of detention and not of the caption; and where the liberty of the subject is concerned, we must be certified of the causes,

Adjournatur,

At another day,

HOLT, *Chief Justice.* It does not appear to us that *Bethel* was in execution; for a commitment to the gaoler is not any commitment in execution; but it must be to the sheriff, for the gaoler is but an under-officer; and it makes no difference that this commitment was in court; for the commitment there is in lieu of process. We in this court * cannot commit to the gaoler, but to the sheriff; for though we have a marshal, and a prison of our own, yet we may commit to the sheriff; and we have often committed to THE GATE-HOUSE, and the sheriffs of London have often taken away a prisoner from this bar for a fine. It is

1. Bac. Abr.
380.

[22]
Vide 1. Salk.
343. 350.

THE KING
against
RATHEL.

true, the gaoler must take notice of a commitment to him; but it is no otherwise good than as he is a servant to the sheriff. His short notes are not a good return to a *habeas corpus*. All the men condemned at THE OLD BAILEY are hanged by this short note, "*Suspens. per coll. (a)*"; and yet that would never be a good return to a writ of error: but here is the matter; the offender knowingly gets a *habeas corpus* to the gaoler, who hastily makes a return to it, and so the sheriff shall be made liable to the servant's fault or negligence.

Comb. 14. 214.
325. 398.
Stiles, 281. 323.
2. Roll. 309.
1. Sid. 78. 143.
1. Salk. 342.

COWPER. There is a stronger case than this (*b*), where the Court was moved for a *habeas corpus* for one that was taken in execution by the sheriff, and was afterwards set at liberty, and after that was retaken on the same execution by the sheriff; and the Court told them they were in the wrong way, for they ought to bring *audita querela*.

Vide 1. Salk.
349. 353. 354.
Carth. 278.
282. 303.
2. Saund. 149.

HOLT, Chief Justice. When a man comes in by *habeas corpus*, by the favour of the Court he may be bailed to appear *de die in diem* till the case is determined, and then he may be remanded to the same prison; and so it was ruled in *Ralph Horwood's Case (c)*, who married a city orphan. By THE PETITION OF RIGHT (*d*) we are to bail or discharge a prisoner in *three days*; but when we bail and afterwards remand him, it is no escape; for the entry is "*remittitur*," and that is a commitment grounded on the old one.

LOVEL. There is nothing judicially before the Court till the return be filed, and then the entry is *committitur mareschallo*, and within three days ensuing they may remand; and then the entry is "*remittitur*," or they may bail him (*e*).

HOLT, Chief Justice. No doubt of that, after the return filed, but he may be remitted and brought up by rule of court, and in the mean time he is in the custody of the gaoler; and when we give judgment on the return, it has relation to the first day.

* [23]

The court of king's bench may bail a prisoner pending a debate whether the return to *hab. cor.* is sufficient.

* At another day the question was, Whether pending the debate about the return to the *habeas corpus*, which was filed, the party should be bailed? for which the case of *Sir William Bronker (f)* was quoted: Information to a justice of peace against *Sir William Bronker* for cheating him at play; upon refusal to find sureties the justice committed him to prison, and, upon *habeas corpus*, the Court took bail for his appearance.

1. Sid. 78. 143.

2. Keb. 146. 305. 514. 1. Salk. 342. 1. Vent. 330. 346. 3. Bañ. Abr. 15.

(a) See Staunford P. C. 182. 4. Bl. Com. 396. 2. Hawk. P. C. ch. 48. l. 7.

(b) Stiles, 147.

(c) 1. Mod. 79. 1. Vent. 178.

2. Lev. 32.

(d) 1. Car. 1. c. 1.

(e) Zach. Croston's Case, 1. Sid.

78.

(f) Stiles, 16.

Upon

Easter Term, 7. Will. 3. In B. R.

Upon this the Court thought fit to deliver their opinion.

EYRE, *Justice*. I do agree that the return is not sufficient, but I think there is enough returned for us to remand him. The judgment is that he shall be fined a thousand pounds, which is returned; therefore I do not know the consequence of this bailing. I ground my opinion on *Shield's Case* (a): The defendants were fined and imprisoned *quousque* before the council of the marches of Wales, on information of unlawful practice and combination in marrying a servant-maid to Powell, a gentleman's son; and upon the return the prisoners were remanded, because it appeared that their fines were not paid, without any other respect had to the matters of the return; and if we let him at large the king may lose his fine. This seems to be a case *primæ impressonis*, and it might encourage others guilty of the same fault. Then it might rid all the gaols in England, if the gaoler's return should be taken so strictly: therefore I think he must be remanded.

If the return to a *babeas corpus* be insufficient, yet the court of king's bench are not bound to bail a prisoner, if enough appear to shew a good cause of commitment.

See Rex v. Judd, 2. Term Rep. 255.

HOLT, *Chief Justice*. That this return contains something not so regular is plain; but however it appears, that he was committed by a court that had jurisdiction of the matter. The law takes notice of the gaoler as one who has the actual custody of the gaol, and therefore it is criminal in him to suffer a voluntary escape: so justices of the peace commit prisoners to the gaoler's custody, and yet at the sessions of *oyer and terminer* the Court takes notice of him as a servant to the sheriff; and the custody of the gaoler is the custody of the sheriff. But now the question is, Whether we shall avoid the commitment upon a *babeas corpus*; or whether you are not put to your writ of error? And truly I think we cannot avoid it on a *babeas corpus*. This word "*remaneat*" is an improper word; it should have been "*committitur*;" but indeed they could not make him remain there unless there had been a commitment. * Besides, since it appears here that he was committed for the fine, I think he must be remanded.

14. Edw. 3. c. 10.
19. Hen. 7. c. 10.
8. & 9. Will. 3. c. 27.
1. Salk. 272.
347.
Comb. 435.
Carth. 145.
1. Show. 117.

* [24]

PER CURIAM. Let him be remanded.

(a) March, 52.

Memorandum.

Case 19.

THE latter end of this Term died SIR GILES EYRE, one of the Judges in the Court of King's Bench; a person of a quick apprehension and a good distinguishing head, but most remarkable for his experience in matters relating to the justices of peace at their sessions, &c. he having practised the most part of his time in the country.

The death of Sir Giles Eyre, and the promotion of Sir Thomas Rokeby. Post. 62.

The Term following SIR THOMAS ROKEBY, KNIGHT, one of the Justices in the Common Pleas, was advanced to the Court of King's Bench in his room.

Memorandum.

Easter Term, 7. Will. 3. In B. R.

Case 26.

Memorandum.

WARD made
Chief Baron, and
TREVOR and
HAWLES at-
torney and Soli-
citor General.

1. Ld. Ray. 46.
58.

THIS Term SIR EDWARD WARD, the King's Attorney General, was called to be a Serjeant at Law, and was afterwards made Lord Chief Baron of the Exchequer.

And SIR THOMAS TREVOR, the King's Solicitor General, was made Attorney General in his place.

And in the Vacation following JOHN HAWLES, of *Lincoln's Inn*, Esq. was made the King's Solicitor General, and was knighted by the king soon after his return from *Flanders*.

TRINITY

TRINITY TERM,

The Seventh of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Samuel Eyres, Knt.

Sir Thomas Rokeby, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

• Ward against Evans.

* [25]

Case 21.

Hilary Term, 7. Will. 3. Roll 718.

REPLEVIN. The defendant makes confession as bailiff to C. H. and E. J. and sets forth, that *Sir Robert Carr*, in 1638, was seised of the *locus in quo*, &c. in fee, and did by indenture grant and demise to C. H. and E. J. and three others (now dead) an annuity of one hundred pounds a-year, to be equally divided between them, *videlicet*, twenty pounds to each, *habendum* the said hundred pounds to them and their assigns for their lives, *videlicet*, twenty pounds to each of them respectively, and to be issuing out of the *locus in quo*, &c. And that he did farther grant, that if any one of the five died, the annuity of twenty pounds payable to such should be paid equally to the other four; and so if two died; and if three died, that the two survivors should have fifty pounds each, but that there should be no survivor of either of their parts. And further, that if any part of this were arrear, that they might distrain; *virtute cujus* the five were seised of the annuity of twenty pounds each, and being so seised three of them died, and that their the share of the party so dying shall be paid equally to the others, but that there shall be no survivor of either of their parts; *Quæritur*, Whether the grantees, in such case, are joint tenants or tenants in common? and, Whether in *replevin*, on a distress for arrears of such annuity, they may avow jointly, or must make several avowries?—S. C. Comb. 329. S. C. Carth. 340. S. C. 1. Salk. 396. S. C. 12. Mod. 227. S. C. Holt, 368. S. C. 1. Ld. Ray. 422. 1. Sid. 157. 2. Salk. 423. Pott. 71. Comb. 329. 347. Cowp. 660.

If a grant be made of an annuity of one hundred pounds to five persons, to be equally divided between them, *videlicet*, twenty pounds to each, *habendum* the said twenty pounds to them and their assigns for their lives, *videlicet*, twenty to each of them respectively, and that on the death of any of them

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parts survived to the two living, and that the annuity was in arrear for several years, the arrears before the death and since amounting in the whole to two thousand two hundred pounds; and for forty pounds the defendant makes confuſance. To this the plaintiff pleads in bar. On which iſſue is joined, which is found for the avowant.

[26]

2. Salk. 423.
1. Lev. 109.

Carth. 340.
441.

1. Salk. 226.
300. 391, 392.
Pott. 29.

1. Salk. 294, 5.

9. Mod. 157.

PEMBERTON, *Serjeant*, now moved in arreſt of judgment; that this is no good confuſance, becauſe the defendants are *tenants in common* of this annuity; and therefore one confuſance cannot be made for both, but it ought to be ſeveral for each of them. The only * queſtion is, Whether a joint confuſance can be made for tenants in common? There has been a difference taken between avowries, which though it ought to be ſeveral, yet a confuſance in the ſame caſe ought to be joint: but I ſhall take no notice of that. This is a gift in common to the five, to be equally divided between them, *viz.* twenty pounds to each, *habendum* to them and their aſſigns reſpectively, *viz.* twenty pounds to each for their lives; ſo that here is a ſeveral annuity to each of them: and when all but two are dead, then fifty pounds ſhall be to each of them; ſo that the grantor intended a ſeveral annuity to them, and not a joint one, and that the diſtreſs ſhould be by them reſpectively. And they ſay in the confuſance, that they were ſeiſed of the annuity ſeverally, yet now they would be *jointtenants* of it, and not *tenants in common*; aſon the face of the deed they appear to be by their own ſhewing; and are ſo concluded to be by their own confuſance. It is objected, that this is no more than what the law would import from the words of the deed; that the hundred pounds is jointly granted, and that it would ſurvive without any appointment of the grantor. I will not rely on the words "equally to be divided," which, without more, would not have made a ſeveral grant; but in the expoſition of deeds it is not unuſual to conſider the *habendum*; and the other clauſes after the grant, to explain the general intent of the whole deed. *Coke*, in his Comment on *Littleton* (a), ſays, that the *habendum* will alter it; and in *Dyer* (b), *Fitzherbert* (c), *Hobart* (d), and *Croke* (e), the whole deed is to be taken together to explain the general words of the premiſes. Now here he grants a hundred pounds to be "equally divided;" but he does not reſt there, but that each ſhall have twenty pounds, which muſt ſignify ſomething, and muſt not be rejected; and ſo it is called a ſeveral annuity throughout the deed, and not a joint one; and that three are dead, and the ſurvivors ſhall have fifty pounds each for their lives, but that that ſhall not ſurvive. And though it ſhould be ſo, yet if the grant were good to the reſt of the tenants in common, the confuſance is bad, becauſe it is as well for the twenty pounds before their deaths as for what has been arrear ſince, when they have ſhewed that they were ſeverally ſeiſed of the twenty pounds for their lives. But they object, that the words "equally to be

(a) Lit. ſect. 223.

(b) Dyer, 361.

(c) Fitz. Abr. "Charge," pl. 9.

(d) Hob. 171.

(e) Cro. Eliz. 25.

if divided" do not make a *tenancy in common* in a deed as it will in a will (a). But I do not rest on that only, for the deed goes further, and gives twenty pounds to each of them. * Then they say, that though the *conuſance* is not good for the whole, yet it is for part, and that if any one of the plaintiffs have title for any part, he ſhall have a return. But if this *conuſance* be not good for any part, it is void for the whole; for they are *tenants in common* from the beginning. *Knight's Caſe* (b) is relied on by them, which was one reſervation and not ſeſeral, which caſe I agree; but it is not like ours, for the reſervation was entire when the rent was once reſerved, and what followed was only to ſhew the rates of the lands: but here the grant is of a hundred pounds equally to be divided, viz. twenty pounds to each; and ſo is the *habendum*, which was not in *Knight's Caſe*, which was a demise of divers houſes in London for years, rendering the yearly rent of five pounds ten ſhillings and eleven pence, viz. for one houſe three pounds eleven ſhillings, for another houſe twenty ſhillings. Now the reſervation was complete *eo inſtanti*. *Hill's Caſe* (c) has been cited too. *Hill* was ſeiſed of a cloſe called *Broom-Acre*, and of two other cloſes in fee; he and his wife *Agatha*, and *Robert* their ſon, let *Broom-Acre*, and the ſaid two cloſes, to *Hutchin*, for ninety years, if he ſo long live, "*reddendo annuatim* to the aforeſaid *Hill* and his wife "for *Broom-Acre* three ſhillings and four pence, *et pro una clauſura* "1s. *et pro altera* 20s. *ad quatuor anni terminos*, and a re-entry for "non-payment:" *Hill* and his wife died; their ſon ſold the reverſion of *Broom-Acre*, rendering rent to *Smith*: the rent of *Broom-Acre* is behind: *Smith* enters and leaſes it to *Reynolds*, who being ejected brings ejection; and judgment was given for him, for that they are ſeſeral reſervations and ſeſeral conditions, and the rent is originally ſeſeral. There is no doubt when two cloſes are demised, two ſeſeral rents may be reſerved: ſo is *Winter's Caſe* (d). The caſe of *Furſe v. Weeks* (e) has been cited too, which is only for the words "equally to be divided:" ſo, no doubt, *tenants in common* may join in avowry for *damage feaſant*; and ſo in treſpaſs.

HOLT, Chief Juſtice. Suppose the words had been "equally "to be divided, viz. twenty pounds to one, &c." and there had been no *habendum*, would they not have been *tenants in common*? Certainly they would. Then where is the difference? Here the hundred pounds annuity is granted to five "equally, &c." The *habendum* is one twenty pounds to one, and ſo on; and there is to be a ſurvivor, but that is by a new grant; and there is to be no ſurvivor between the laſt two. As to the caſe of *Stukely v. Butler* (f), where *Hobart* puts a difference where the rents are reſerved ſeſerally at the firſt, and where they are entire at the firſt, it

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Moore, 199,
200, 201, 202,
3. Leon. 124,
125, 126, 127,
1. And. 173,
174, 175, &c.

1. Lev. 109,
Ray. 80.
1. Sid. 157.
1. Keb. 564,
372.

(a) See Den v. Gaskin, Cowp. 660.

(b) 5. Co. 54.

(c) 4. Leon. 187.

(d) Dyer, 308, 309.

(e) 2. Roll. Abr. 90, pl. 5.

(f) Hob. 171, 172.

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is not yet determined; my Lord Hobart only * recites his own opinion there. Look at the same case in *Moore* (a); the Court was divided there as to the word "*videlicet*:" Lessor grants "all trees, woods, underwoods, growing in the manor of, &c. *videlicet*, within the grounds called A. B. and C." If the *videlicet* were void or not? was the question.

2. Lev. 17.
3. Vent. 167,
265.
1. Rol. Abr.
561.
2. Keb. 601.
303. 338, &c.

CARTHEW *ad idem*. The intent of the grantor was, that there should be several rents to the five grantees, and the Court will expound it accordingly. The intent appears by the grant in the premises, the *habendum*, and the clause of distress; in all which the words "severally and respectively" are always used, which makes it the same as if they were applied to each person and grant distinctly; and this is proved by the pleading of such words in many cases, of which I will cite two or three. In the case of *Coryton v. Litbely* (b), *Coryton* and *Hartly* joined in action against *Litbely* for grinding at their mills; the declaration was demurred to, because it appeared their interests were several; and by the Court, though their interests be several, yet the not grinding at any of their joint mills is an entire damage to both of them. And if these words shall be taken so in pleading, to divide that which otherwise would be joint, much more they shall in grants; and if the grantor had intended this for a joint grant, the subsequent clause of giving it by survivor would be useless and void; and if it be an entire and joint grant, then it must survive in the case of the last two, notwithstanding the clause that it shall not; which is contrary to his express meaning and intent. There are some cases that come up to this (c). The case of *Bere v. Woodley* (d) is a strong case for us; but they all over-rule this: for in those cases, either in the premises, in the *habendum*, or in the distress, there is some word absolutely joint; but here throughout the deed the words are several. As to *Knight's Case*, which was objected, there the land was first charged with an entire rent, and then the "*viz.*" comes too late; but if the words had been several at the first, the reservation had been so too; and so it little differs from *Winter's Case* (e), and will not affect ours, which does not come under a *videlicet*; and the case of *Furse v. Weeks* is not to the purpose.

DARNELL *contra*. This is a *joint-tendency* on the whole deed. They have not answered the material part of the cases cited by us. In the case of *Furse v. Weeks* the difference * appears to be taken by the Court, and there distinct payments were appointed as here; and that was a stronger case, for it was on a will, and this is on a deed. The grant is joint of one rent of a hundred pounds a-year, and the clause of distress is, that if the hundred pounds be behind, and not if the several rents of twenty pounds is arrear; so that this is also joint, which shews his intent.

- (a) *Moore*, 380.
(b) 2. Saund. 115.—See also the Year-Book 11. Hen. 6. pl. 11. and *Rastal's Entries*, 615. b. and 625. a.
(c) *Whorwood v. Shaw*, Yelv. 23. 24. *S. C.* *Moor*, 667. *Owen*, 127. 2. *Brown*, 31. *Cro. Eliz.* 729. *Tanfield v. Rogers*, *Cro. Eliz.* 340. *Ards v. Watkin*, *Cro. Eliz.* 637. 651. *Winter's Case*, *Dyer*, 308.—See also 17. *Affize*, pl. 10.
(d) *Jones*, 202. *S. C.* *Cro. Cas.* 154.
(e) *Dyer*, 308.

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HOLT, *Chief Justice*. I do not know why a *videlicet* shall not make a separation, as well as an *habendum*; and this is also separate in the *habendum*, for it is to each of them and their "assigns" respectively, for the lives of them and either of them respectively." If you construe it to be a several grant, all the parts of the deed are satisfied, but not if it be taken joint; for then a payment to one would be a payment to all, when the deed limits twenty pounds to each of them. And how can it be construed according to the intent, when each of them would not have a remedy for his twenty pounds without partition? Then the distress is also several. The whole annuity is a hundred pounds in gross, but it is distributed into twenty pounds to each; and as to the survivor on the death of the three first, that amounts to a new grant, and it shall not survive as to the two last: now if it be a several rent, the arrears shall not survive, but go to their executors; the words of the deed cannot be satisfied unless it be made a several grant. "Equally to be divided" do not make it several, but all the clauses are several of themselves. You must agree, that if it had been said, "*habendum* twenty pounds to one, and so to the rest," that had been several; and that is the same in effect, though it says, "*habendum* the hundred pounds to them to be equally divided, *viz.* twenty pounds to one," which is the same as if it had been the fifth part to one, and so to the rest; in which case, one could not have avowed for twenty pounds, as here he must, but for the fifth part.—Let me have a copy of the deed, for it is set forth in *hac verba*; for if on *oyer* of the deed you have avowed otherwise than you ought, they may take advantage of it, though after verdict, as they may of any thing that makes the avowry abateable; for we must judge on the whole record.

Adjournatur (a).

(a) It is said, S. C. Holt, 368. that in Hil. 10. Will. 3. judgment was given for the defendant by the whole Court. So in S. C. 1. Ld. Ray. 423. S. C. 1. Salk. 391. S. C. 12. Mod. 228. But by *Comberbatch* the judgment was arrested, and the defendant ordered to plead and avow *de novo*, S. C. Comb. 330; and

Carthew says, that no judgment was given, but that afterwards the grantees took new distresses severally, and, upon new replevins brought, made several avowries as for several rents; and then the parties agreed, and nothing farther was done. S. C. Carth. 342.

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Hob. 172. 276.
Moore, 330.
1. Salk. 294.
1. Saund. 118.
169. 186.
2. Saund. 290.

Ante, 26:
1. Salk. 236,
390.

The King against Hornby;

OR,

THE BANKERS CASE.

Case 22.

A PETITION to the treasurer and barons of the exchequer was exhibited by *Joseph Hornby* in *Hilary Term* the first year of *William and Mary* for the allowance of *letters patents* granted *Charles the Second*, his heirs and successors, in lieu of wards, liveries, purveyances, &c. was a gift to him *in fee*, and being, like other inheritances, *alienable*, a GRANT made by him of so much a-year out of the said hereditary revenue of excise, for the payment of the interest of such sums of money as he had borrowed from *individual* subjects, was good and valid in law, and bound the king's successors:—and to procure the payment of such annuity, the patentees may *petition* the barons of exchequer.—S. C. Comb. 270. S. C. Carth. 388. S. C. 1. Freem. 331. S. C. Skin. 601. S. C. 11. State Trials, 137. 4. Bac. Abr. 206.

The revenue of
THE EXCISE
given by par-
liament to

by

THE KING
against
Hornby; OR,
THE BANKERS
CASE.

by King Charles the Second * for payment of an annuity out of the excise, &c. THE ATTORNEY GENERAL demurs generally, The Court gave judgment for the petitioner Hornby.

THE ATTORNEY GENERAL thereupon brought a writ of error, which was argued in the exchequer chamber, where the judgment was reversed.

Record. Petition. et Morac. superinde et Judicium, et Brevis de Error.

Termino Sancti Hillarii Anno 1. Gulielmi et Mariae, Regis et Reginae.

LOND. **MEMORANDUM**, quod JOSEPHUS HORNBY MID. de LOND. gen. venit coram baronibus de scaccaria vicesimo primo die Octobr. hoc termino in propria persona sua et exhibit curiae hic quasdam literas patentes dom. CAROLI SECUNDI nuper regis ANGLIAE, &c. sub magno sigillo ANGLIAE confect. geren. dat. tricesimo die Aprilis anno regni dict. dom. CAROLI nuper regis ANGLIAE vicesimo nono eid. JOSEPHO HORNBY, hered. et assignat. suis confect. de annuali redditu sive summa mille trecent. quinquagint. et duar. libr. septemdecim. solid. et decem denar. annuatim solvend. recipiend. et percipiend. ANGLICE "taken" per praed. JOSEPHUM HORNBY hered. et assign. suos in perpetuum de redditibus reversionibus proficiuis et perquisit. et emolument. et solutionibus reservat. surgen. crescen. et provenien. eid. nuper dom. regi CAROLO SECUNDO hered. et successoribus suis de pro ex sive ratione debiti excise ANGLICE "duty of excise" super potum lupulat. et illupulat. et alios liquores infra regn. ANGLIAE domin. WALLIA et vil. BERWICI super TWEDAM virtute actus parlamenti facti. anno regni ejusdem nuper regis CAROLI SECUNDI duodecimo institut. "An Act for taking away the Court of Wards and Liveries and Tenures in capite, and by Knights Service and Purveyance, and for settling a Revenue upon His Majesty in Lieu thereof," dat. et concess. solvend. quarteriatim viz. ad festum Annuntiationis BEATAE MARIAE VIRGINIS Nativitatis SANCTI JOHANNIS BAPTIST. SANCTI MICHAEL. ARCH. et Nativitatis DOM. per aequas et aequales portiones sub fiducia in iisdem literis patentibus expressa. Et praed. JOSEPHUS HORNBY petit literas patent. de recordo hic irrotulari. Quas quidem literas patent. barones hic receperunt et illas legi et sub serie verborum in iisdem literis patent. content. irrotulari praecerunt. Et tenor earund. literarum patent. sequitur in haec verba, scilicet, "CHARLES THE SECOND, by the Grace of God of England, Scotland, France and Ireland, KING, Defender of the Faith, &c. To all to whom these presents shall come, greeting. WHEREAS, since the time of our happy Restoration, we have been involved in great and foreign wars, as well for the safety of our government, as for the vindication of the rights and privileges of our subjects; in the prosecution whereof we have been constrained for some years past, contrary to our inclination, to postpone the payment of the monies due from us to several

GOLDSMITH,

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"GOLDSMITHS and others, upon *tallies* struck, and orders registered on and payable out of several branches of our revenue and otherwise. And although the present posture of our affairs cannot reasonably spare so great a sum as must be applied to the satisfaction of those debts, yet considering the great difficulties which very many of our loving subjects, who put their monies into the hands of those goldsmiths and others, from whom we received it, do at present lie under, almost to their utter ruin for want of their said monies; we have rather chose, out of our princely care and compassion towards our people, to suffer in our own affairs, than that our loving subjects should want so seasonable relief: and having seriously considered of the ways and means to effect this our present purpose, we could not find any more effectual and less prejudicial to us in the present posture of our revenue, than by granting to each of them the said goldsmiths and others, to whom we are indebted as aforesaid respectively, and to his and their heirs and assigns, an annual sum or payment, answerable in value yearly to the interest of their respective debts, at the rate of six pounds *per cent. per annum*, for all such monies that are due unto them. The consideration whereof induced us to command our HIGH TREASURER OF ENGLAND to cause all the accompts of the said goldsmiths to be stated and made up by *Richard Aldworth, Esq.* one of our auditors, to the first day of *January 1676*; which having been accordingly cast up and settled, it appears thereby that there is due and owing by us unto our trusty and well-beloved subject *Joseph Hornby* of London, goldsmith, the sum of twenty-two thousand five hundred and forty-eight pounds five shillings and sixpence. In satisfaction whereof, according to our intent in these presents expressed, we have resolved to grant unto him the sum of one thousand three hundred fifty-three pounds seventeen shillings and ten pence *per annum*, out of that part of our revenue of excise which was granted to us, our heirs and successors for ever, by an act of parliament made in the twelfth year of our reign, intituled, "*An Act for taking away the Court of Wards and Liveries, and Tenures * IN CAPITE, and by Knights Service and Purveyance, and for settling a Revenue upon His Majesty in Lieu thereof.*" KNOW YE THEREFORE, That we, for the consideration aforesaid, and in satisfaction or lieu of the said debt, or sum of twenty-two thousand five hundred forty-eight pounds five shillings and six pence, by us owing to the said *Joseph Hornby*, and of our especial grace, certain knowledge, and meer motion, have given and granted, and by these presents, for us, our heirs, and successors, do give and grant unto the said *Joseph Hornby*, his heirs and assigns, one annual or yearly rent or sum of one thousand three hundred fifty-two pounds seventeen shillings and ten pence, of lawful money of *England*, to be yearly had, received, and taken by the said *Joseph Hornby*, his heirs and assigns for ever, out of the rents, revenues, profits, and perquisites, emoluments and

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" payments reserved, arising, accruing, or coming, or that
" hereafter shall or may be reserved, arise, accrue or become
" due or payable to us, our heirs and successors, out of, for or
" by reason of the duty of excise upon beer, ale and other liquors
" within our kingdom of *England*, dominion of *Wales*, and town
" of *Berwick upon Tweed*, by virtue of the said act of Parliament,
" the said sum of one thousand three hundred fifty-two pounds
" seventeen shillings and ten pence *per annum*, to be paid quar-
" terly at the four most usual feasts in the year, that is to say,
" at the feast of the Annunciation of the *Blessed Virgin Mary*, the
" Nativity of *St. John the Baptist*, *St. Michael the Archangel*,
" and the Birth of our Lord God, commonly called *Christmas*,
" by even and equal portions, in trust for such of the creditors of
" the said *Joseph Hornby*, as within one year next ensuing the
" date hereof shall, upon notice of these presents, deliver up their
" securities, and accept of assignments of proportionable parts of
" the said yearly sum of one thousand three hundred fifty-two
" pounds seventeen shillings and ten pence for satisfaction of
" their respective debts, according to the true intent and meaning
" of the covenant in that behalf herein after contained, for so
" much as their proportionable parts shall amount unto, and in
" the mean time shall not sue or prosecute the said *Joseph Hornby*,
" his heirs, executors or administrators, for such their debts; and
" the residue and overplus of the said yearly sum of one thousand
" three hundred fifty-two pounds seventeen shillings and ten pence
" to remain and be to and for the proper use and benefit of the
" said *Joseph Hornby*, his heirs and assigns, without any trust or
" account whatsoever; the first payment of the said sum of one
" thousand three hundred fifty-two pounds seventeen shillings and
" ten pence to commence from the feast of the Birth of our
" Lord God one thousand six hundred seventy and * six: AND
" WE DO HEREBY, for us, our heirs and successors, authorize
" direct and appoint our high treasurer, chancellor, under-tre-
" surer, chamberlain and barons of our EXCHEQUER, and the
" high treasurer and commissioners of the treasury, chancellor,
" under-treasurer, chamberlain and barons of the EXCHEQUER,
" of us, our heirs and successors that hereafter shall be, and all
" other officers and ministers of the said court and of the receipt
" thereof now being or that hereafter shall be, that they and
" every of them, in their respective places, do from time to
" time, upon request of the said *Joseph Hornby*, his heirs or
" assigns, respectively perform all acts necessary for the constant
" and due payment of the said yearly rent or sum of one thou-
" sand three hundred fifty-two pounds seventeen shillings and
" ten pence to the said *Joseph Hornby*, his heirs or assigns, as
" the same shall grow due and become payable, and of every such
" part and parts as the said *Joseph Hornby*, his heirs or assigns,
" shall grant or assign to any person or persons, from time to time,
" according to the trust and agreement in that behalf herein con-
" tained; and as occasion shall be, levy or strike, or cause to be
" levied or stricken in the receipt of the exchequer of us, our
" heirs

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“ heirs and successors, from time to time, tallies of *pro* or assign-
“ ment, or other tallies, as the case may require, and as shall be
“ desired, upon the commissioners, treasurers, receivers, collec-
“ tors or farmers of the said duty and revenue for the time being;
“ or upon such other person or persons as ought to be charged or
“ chargeable therewith, or accountable to us, our heirs and suc-
“ cessors for the same, who are hereby required and directed from
“ time to time to make due payment thereof accordingly; so that
“ the said *Joseph Hornby*, his heirs and assigns respectively, of all
“ or any part or parts thereof, may certainly and duly, and on
“ every of the said quarterly feast-days afore-mentioned, for ever
“ hereafter have and receive the said yearly rent or sum of one
“ thousand three hundred and fifty-two pounds seventeen shillings
“ and ten pence, hereby granted out of our said revenue, without
“ any further or other warrant to be sued for, had or obtained from
“ us, our heirs and successors, in that behalf, and without any ac-
“ count, imprest, or other charge to be set upon the said *Joseph*
“ *Hornby*, his heirs or assigns, or any of them, for the same:
“ and if it shall happen at any time hereafter, that the rents, if-
“ sues, or profits of our said revenue shall be paid into the re-
“ ceipt of our EXCHEQUER, or elsewhere, to the use of us, our
“ heirs or successors, before the levying of such tallies, or before
“ payment be made to the said *Joseph Hornby*, his heirs or assigns
“ respectively, of the said yearly rent or sum of one thousand
“ three hundred fifty-two pounds seventeen shillings and ten
“ pence, or any part thereof, according to the true intent of these
“ our letters patents; then, and in such case, our express will
“ and pleasure is, and we do hereby of our further especial grace,
“ certain knowledge, and mere motion, for us, our heirs and suc-
“ cessors, authorise and require the high treasurer, and commis-
“ sioners of the treasury, chancellor or under-treasurer, cham-
“ berlain and barons of the EXCHEQUER, of us, our heirs and suc-
“ cessors, for the time being, and all other officers and ministers of
“ the EXCHEQUER, and of the receipt thereof, that they or such of
“ them to whom it appertains, do from time to time, as often as
“ need shall be, well and truly pay, or cause to be paid, unto the
“ said *Joseph Hornby*, his heirs and assigns respectively, out of
“ such monies as shall be so paid into our EXCHEQUER, or else-
“ where, to the use of us, our heirs and successors, all such, or so
“ much of the said yearly rent or sum of one thousand three hun-
“ dred fifty-two pounds seventeen shillings and ten pence, as shall
“ from time to time be in arrear, or unpaid, after the feast-days or
“ times of payment aforesaid, or any of them, without any further
“ or other warrant to be sued for, had or obtained in that behalf,
“ and without any account, imprest, or other charge to be set
“ upon him the said *Joseph Hornby*, his heirs or assigns, for the
“ same, or any part thereof: and these our letters patents, or the
“ exemplification, entry or inrollment thereof shall be unto the
“ high treasurer, commissioners of the treasury, chancellor and
“ under-treasurer, chamberlain and barons of the EXCHEQUER,
“ of us, our heirs and successors, and all other officers and ministers

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“ the said EXCHEQUER, and to the commissioners, treasurer, re-
“ ceivers, collectors, farmers, and all other officers and ministers
“ of our said revenue of excise, a good and sufficient warrant and
“ discharge for all and whatsoever they or any of them respectively
“ shall do, or cause to be done, in or about the premises, pur-
“ suant to our will and pleasure herein before declared. And our
“ further will and pleasure is, and we do hereby of our especial
“ grace, certain knowledge, and meer motion, grant, direct and
“ appoint, that all such tallies of *pro* or assignment, or other tallies
“ as shall be hereafter levied or struck upon our said revenue of
“ excise, at the instance and desire of the said *Joseph Hornby*, his
“ heirs or assigns respectively, for or towards the satisfaction or
“ securing the payment of the said yearly rent or sum of one thou-
“ sand three hundred fifty-two pounds seventeen shillings and ten
“ pence, or any part thereof, shall be well and truly paid and satis-
“ fied out of the said revenue quarterly, and every quarter as
“ aforesaid; and shall be preferable and preferred before any other
“ quarterly payments out of the same, by virtue or colour of any
“ warrant, order or direction whatsoever * of any after date, ex-
“ cepting only such yearly sums as are necessarily payable for the
“ management of our said revenue, and except the yearly sums
“ amounting to twelve thousand two hundred and nine pounds
“ fifteen shillings and four pence halfpenny, or thereabouts, pay-
“ able thereout unto our dearest consort the queen, as parcel of
“ her jointure; and the yearly sum of twenty-four thousand pounds,
“ payable to our most dear brother *JAMES Duke of York*; which
“ said several sums, we will and do hereby direct, shall be paid
“ and satisfied unto our said dearest consort, and to our said most
“ dear brother, out of the said revenue, duly, constantly, and in
“ the first place, before any of the said payments, or any other pay-
“ ments whatsoever to be made out of the same. And our will
“ and pleasure is, and the said *Joseph Hornby*, for himself, his heirs,
“ executors, and administrators, doth covenant, grant and agree,
“ to and with us, our heirs and successors, that he the said *Joseph*
“ *Hornby*, his heirs and assigns, shall and will, at any time or
“ times, within one year next ensuing the date hereof, grant and
“ assign proportionable part and parts of the said yearly rent or
“ sum of one thousand three hundred fifty-two pounds seventeen
“ shillings and ten pence unto such of his creditors, or others, by
“ their appointment, as will be content to deliver up their secu-
“ rities, and take such assignments in satisfaction of their debts,
“ according to the trusts herein before expressed; and that he the
“ said *Joseph Hornby*, his heirs or assigns, shall not nor will, du-
“ ring the said space of one year, make any grant or assignment
“ of all, or any part of the said yearly sum of one thousand three
“ hundred fifty-two pounds seventeen shillings and ten pence
“ unto any person or persons but such as are creditors of the said
“ *Joseph Hornby*, or others by their appointment as aforesaid:
“ and that if any difference shall at any time or times, within the
“ space of one year and an half now next coming, arise between

“ the

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“ the said *Joseph Hornby*, his heirs, executors, administrators or
“ assigns, or any of them, and the said creditors, or any of them,
“ touching the assigning or disposing of all or any part or parts
“ of the said annuity or yearly sum of one thousand three hundred
“ fifty-two pounds seventeen shillings and ten pence; that then
“ the said *Joseph Hornby*, his heirs, executors, administrators and
“ assigns, shall and will from time to time submit themselves, and
“ all matters and things relating thereunto, to the controul of the
“ lord high treasurer, or the commissioners of the treasury for the
“ time being, and shall and will observe and fulfil all such orders
“ and directions as the lord high treasurer, or the commissioners
“ of the treasury, shall from time to time make or give concern-
“ ing the same. PROVIDED ALWAYS, and our further will and
“ pleasure, intent and meaning * is, and is hereby declared to be,
“ that all assignments to be made as well before as after the said
“ space of one year, of any part or parts of the said yearly sum of
“ one thousand three hundred fifty-two pounds seventeen shillings
“ and ten pence hereby granted, shall, within the space of thirty
“ days next after the execution thereof, be enrolled before the
“ auditor of the receipt of THE EXCHEQUER, or the clerk of the
“ pells for the time being, to the end it may appear what assign-
“ ments have been granted, and payments may be made there-
“ upon according to the intent of these presents, and that every
“ assignment not so enrolled shall be of none effect. PROVIDED
“ ALSO, that when we, our heirs or successors, shall at entire
“ payments have actually paid the full sum of twenty-two thou-
“ sand five hundred forty-eight pounds five shillings and six pence,
“ of lawful money of *England*, to the said *Joseph Hornby*, his
“ heirs and assigns, and to such person or persons to whom such
“ assignment or assignments shall be made as aforesaid, respec-
“ tively, in proportion amongst them, after the rate of one hun-
“ dred pounds, principal money, for each and every six pounds
“ per annum, which they, every, or any of them respectively shall,
“ or ought to have and enjoy of the said yearly sum of one thou-
“ sand three hundred fifty-two pounds seventeen shillings and
“ ten pence, hereby granted by virtue of these presents, or such
“ assignment or assignments as shall be made and enrolled as aforesaid, and so after those proportions and rates for greater or lesser
“ sums, as the respective cases shall happen, and also the arrears
“ of the said yearly sum of one thousand three hundred fifty-two
“ pounds seventeen shillings and ten pence, if any be: THAT
“ THEN THESE PRESENTS, and the grant of the said yearly sum
“ of one thousand three hundred fifty-two pounds seventeen shil-
“ lings and ten pence shall cease and be void, any thing herein
“ before contained to the contrary notwithstanding. And we do
“ hereby of our further especial grace, certain knowledge, and
“ meer motion, for us, our heirs and successors, grant unto the
“ said *Joseph Hornby*, his heirs and assigns, and our express plea-
“ sure is, that these our letters patents, and every clause, article,
“ and sentence therein contained, whereupon any ambiguity or

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“doubt shall or may arise, that the same shall be at all times ex-
“pounded and taken most favourably and beneficially for the ad-
“vantage of the said *Joseph Hornby*, his heirs and assigns; and that
“these our letters patents shall be good and effectual in law, and
“shall be available to the said *Joseph Hornby*, his heirs and assigns
“respectively, for his and their receiving and enjoying the said
“yearly rent or sum of one thousand three hundred fifty-two
“pounds seventeen shillings and ten pence, with all the appurtenances
“thereof in manner aforesaid, notwithstanding the not reciting,
“or not * mentioning, or not truly and certainly reciting or
“mentioning of any act or acts of parliament, whereby the said
“revenue was given and granted unto us, our heirs and succes-
“sors, or by what title we have received or enjoyed the same:
“and notwithstanding the not reciting, or not mentioning in this
“our grant, any lease or leases, grant or grants, charge or charges,
“made of or upon, or out of the said revenue, or any part thereof
“alone on the said revenue, or on the same, and any other part
“or parts of our revenue of excise, or generally on our revenue,
“or the date or contents of such leases or grants, or of the persons
“to whom the same are made: and notwithstanding that no men-
“tion be herein of the direct and certain yearly and other rents
“and profits of the premises, or of the certain true or direct na-
“ture of such rents and profits, or how or in what manner they
“arise, become due, or payable unto us, our heirs and successors;
“and notwithstanding the not mentioning how, and in what man-
“ner the said debt due from us to the said *Joseph Hornby* ariseth
“particularly, or any mistake in the stating, or in the quantity or
“sum of the aforementioned debt due, or herein mentioned to be
“due by us to the said *Joseph Hornby*: and notwithstanding the
“statute of *Henry the Fourth*, late king of *England*, published
“in the first year of his reign: and notwithstanding the statute
“of *Henry the Sixth*, late king of *England*, made and published
“in the eighteenth year of his reign: and notwithstanding the
“statute of *Henry the Eighth*, late king of *England*, made and
“published in the twenty-sixth year of his reign: and notwith-
“standing the statutes or acts of this present parliament, made and
“published in the twelfth year of our reign, whereby the said revenue
“was, or was mentioned or intended to be granted, settled, and con-
“firmed unto us, our heirs and successors, or any article, clause,
“sentence, or restraint therein contained: and notwithstanding
“any defect in this our grant, or any act, statute, ordinance,
“proclamation, provision or restraint whatsoever made or pro-
“vided, or any other act, matter, or thing whatsoever to the con-
“trary hereof, in any wise notwithstanding. And lastly, our will
“and pleasure is, and we do hereby of our more abundant grace,
“certain knowledge, and meer motion, for us, and our heirs and
“successors, covenant and grant to and with the said *Joseph*
“*Hornby*, his heirs and assigns, that due payment shall be made
“of the said yearly sum of one thousand three hundred fifty-two
“pounds seventeen shillings and ten pence, hereby granted, and
“all

" all other things hereby directed to be done on our part, shall be
 " from time to time done and performed, according to the true
 " intent and meaning of these presents : and that if at any time
 " hereafter, any defect or * question shall be found or made of or
 " in the validity of this our present grant, that then upon the hum-
 " ble petition of the said *Joseph Hornby*, his heirs and assigns, we,
 " our heirs and successors, will be graciously pleased to make such
 " further grant, assurance, and confirmation of the said yearly rent
 " or sum of one thousand three hundred fifty-two pounds seventeen
 " shillings and ten pence to the said *Joseph Hornby*, his heirs or
 " assigns, as by our attorney general shall be approved of and ad-
 " vised, and by the counsel learned in the law of the said *Joseph*
 " *Hornby*, his heirs or assigns, shall be advised and desired, and with
 " such beneficial clauses therein to be contained, as shall be thought
 " expedient and most conducing to the performance of our will
 " and pleasure herein before declared. IN WITNESS whereof, &c."

Quibus quidem literis potentibus lectis præd. JOSEPHUS HORNBY
dicit, quod vigore præmissorum ipse idem JOSEPHUS HORNBY scisit.
fuit de et in præd. annuali redditu sive summa mille trecent. quin-
quagint. et duarum libr. septendecim solid. et decem denar. ut de feodo
et jur. Et sic inde scisit. existens. p se idem JOSEPHUS HORNBY postea
scilicet quinto die Augusti anno regni domini (nuper regis) CAROLI
SECUNDI tricesimo tertio apud WEST. præd. per quoddam scriptum
suum sigillo suo sigillat. et in cur. hic de record. debet. modis et debet.
juris forma irrotulat. cujus dat. est eisdem die et anno ult. mentionat.
pro consideratione. in eodem script. mentionat. relaxavit præfat. do-
mino CAROLO SECUNDO hæredibus et successoribus suis annual.
sum. sexcent. l. br. parcel. præd. annual. sum. mille trecent. quinquagint.
duar. libr. septendecim solid. et decem denar. præfat. JOSEPHO
ut præfert. concess. prout per record. cur. il. liquet et apparet; et ipse
idem JOSEPHUS HORNBY continuavit et adhuc scisit. exist. ut de
feodo et jure de et in annuali redditu sive summa septingent. quin-
quagint. duar. libr. septendecim solid. et decem denar. resid. præd.
annualis redditus sive summa mille trecent. quinquagint. duar. libr.
septendecim solid. et decem denar. in literis patentibus præd. mentionat.
et per eandem eid. JOSEPHO ut præfert. concess. et eundem annualem
redditum sive summam septingent. quinquagint. et duar. libr. septen-
tendecim solid. et decem denar. resid. præd. annuali redditus sive
summa mille trecent. quinquagint. duar. libr. septendecim solid. et
decem denar. de jure habere et recipere debuit et debet vigore literarum
potentium præd. Et præfat. JOSEPHUS ulterius dicit, quod ipse
recepit et satisfactus fuit, et existit de et pro omnibus arrearagiis
præd. annualis summa septingent. quinquagint. et duar. libr. septen-
decim solid. et decem denar. debuit. et sciubi. ad festum et pro festo
Annunciationis BEATÆ Mariæ Virginis anno regni domini
(nuper regis) CAROLI SECUNDI tricesimo quinto, et quod summa
quinque mille octogint. et duar. libr. quatuor denar. et unius oboli,
pro arrearagiis ejusdem annuali summa septingent. quinquagint. et
*duar. * libr. septendecim solid. et decem denar. post præd. festum An-*
nunciationis BEATÆ Mariæ Virginis anno tricesimo quinto

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supradict. debet. et solubil. ad festum et pro festo Natalis Domini, communiter vocat. Christmas ult. præterit. anno primo regnorum dictorum domini regis et domine regine nunc modo debet. et insolubil. existit præsent. JOSEPHO HORNBY, scilicet sum. cent. octoginta. et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno quarterio anni finit. ad festum Nativitatis SANCTI JOHANNIS BAPTISTÆ anno regni dicti (nuper regis) CAROLI SECUNDI tricesimo quinto, et simil. sum. centum octoginta et octo librarum quatuor solidorum quinque denariorum et unius oboli, pro uno alio quarterio anni finit. ad festum SANCTI MICHAELIS ARCHANGELI anno tricesimo quinto supradict. et simil. sum. centum octoginta et octo librarum quatuor solid. quinque denariorum et unius oboli, pro alio quarterio anni finit. ad festum Natalis Domini anno tricesimo quinto supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno quarterio anni finit. ad festum Annunciationis BEATÆ Mariæ VIRGINIS anno regni dicti (nuper regis) CAROLI SECUNDI tricesimo sexto; et simil. sum. cent. octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis SANCTI JOHANNIS BAPTISTÆ anno tricesimo sexto supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum SANCTI MICHAELIS ARCHANGELI anno tricesimo sexta supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Natalis DOMINI anno tricesimo sexto supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Annunciationis BEATÆ Mariæ VIRGINIS anno primo (nuper regis) JACOBI SECUNDI; et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis SANCTI JOHANNIS BAPTISTÆ anno primo supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum SANCTI MICHAELIS ARCHANGELI anno primo supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis Domini anno primo supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Annunciationis BEATÆ Mariæ VIRGINIS anno secundo regni ejusdem nuper JACOBI SECUNDI regis; et simil. sum. cent. octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis SANCTI JOHANNIS BAPTISTÆ anno secundo supradict. et simil. sum. centum octoginta et octo librarum quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum SANCTI MICHAELIS ARCHANGELI anno secundo supradict. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro alio quarterio anni finit. ad festum Natalis Domini anno secundo supradict. et simil. sum. centum octoginta et octo librarum quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Annunciationis BEATÆ Mariæ VIRGINIS

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anno tertio regni ejusdem (nuper regis) JACOBI SECUNDI; et simil. sum. centum octoginta et octo librarum quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis SANCTI JOHANNIS BAPTISTÆ anno tertio supradicti. et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum SANCTI MICHAELIS ARCHANGELI anno tertio supradicti; et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Natalis Domini anno tertio supradicti; et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Annunciationis BEATÆ Mariæ Virginis anno quarto regni præd. (nuper regis) JACOBI SECUNDI; et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis SANCTI JOHANNIS BAPTISTÆ anno quarto supradicti; et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum SANCTI MICHAELIS ARCHANGELI anno quarto supradicti; et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Natalis Domini anno Domini millesimo sexcentesimo octogesimo octavo; et simil. sum. centum octoginta et octo librarum quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Annunciationis BEATÆ Mariæ Virginis anno regni præd. GULIELMI et Mariæ (nunc regis et reginæ) primo; et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Nativitatis SANCTI JOHANNIS BAPTISTÆ anno primo supradicti; et simil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum SANCTI MICHAELIS ARCHANGELI anno primo supradicti; necnon alia consimil. sum. centum octoginta et octo libr. quatuor solid. quinque denar. et unius oboli, pro uno alio quarterio anni finit. ad festum Natalis Domini nunc ult. præterit. et anno primo supradicti, attingen. in toto ut supra. Et petit idem JOSEPHUS HORNBY, quod præd. breve paten. in forma præd. facti. juxta tenor. et effect. earundem præfat. JOSEPHO HORNEY ollocentur, et quod præd. sept. aliæ quarteriales summæ centum octoginta et octo librarum quatuor solid. quinque denar. et unius oboli, a festo Annunciationis BEATÆ Mariæ Virginis anno regni dicti (nuper regis) CAROLI SECUNDI tricesimo quinto usque ad festum et pro festo Natalis Domini nunc ult. præterit. attingen. ut supra ad quinque mille octoginta et duas libr. quatuor denar. et unum obolum, sicut præfertur debet. et aretro, et insolut. existen. * præfat. JOSEPHO HORNBY spiciuntur; quodque etiam præd. annual. reddit. sive sum. septingen. quinquaginta et duarum libr. septendecim solid. et decem denar. resid. præd. annual. reddit. sive sum. mille trecent. quinquaginta et duarum libr. septendecim solid. et decem denar. in literis patentibus præd. mentionat. a præd. festo Natalis Domini ult. præterit. præfat. JOSEPHO HORNBY, hæred. et assign. suis, ad præd. separalia festa in dictis literis patentibus specificat. in posterum per æquas et æquales portiones secundum formam et effectum literarum patentium præd. solvetur; quodque talis toties quoties casus requireret, levand. ad recept. hujus s. accar.

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scaccar. pro dicto annuali redditu sive summa septingent. quinquaginta et duarum libr. septendecim solid. et decem denar. resid. præd. sum. mille trecent. quinquaginta et duarum libr. septendecim solid. et decem denar. quando et quoties idem resid. reddit. sive sum. seu aliqua pars vel parcel. inde deveniret debet. levarentur secundum formam effectum et directionem earundem literarum patentium, et secundum cursum recept. hujus scaccarii, et quod omnes potest. remed. et res quæcunque in et per dict. liter. patent. concess. et mentionat. tangen. solution. denar. sum. in dictis literis patent. mentionat. et pro beneficio præfat. JOSEPHI HORNBY hæred. et assign. suorum exsequerentur et capiant effectum secundum formam et effectum liter. patent. præd. cum hoc quod idem JOSEPHUS HORNBY verificare vult, quod ad præd. festum Natalis Domini ult. præterit. sufficien. fuer. et ad hoc sufficien. existunt de reddit. reversion. proficuis, perquisition. ANGLICE "perquisites" emolument. et solution. renovan. provenien. recept. et solut. de et pro debito de le excise præd. virtute actus parliamenti præd. ad solvend. et satisfaciend. præfat. JOSEPHO HORNBY, præd. summam septingent. quinquaginta et duarum libr. septendecim solid. et decem denar. sicut præfertur ei debet. et a retro existen. ultra et præter omnes annual. sum. necessar. et solubil. usque tempus illud pro gubernation. ANGLICE "management" dict. reversion. et ultra et præter præd. sum. duodecim mille ducent. et novem libr. quindecim solid. quatuor denar. et unius oboli, aut eo circiter, solubil. exinde CATHERINÆ REGINÆ, tunc conjort. nunc reginæ dotal. dicti domini (nuper regis) CAROLI SECUNDI, ut parcel. juncturæ suæ, in literis patentibus præd. mentionat. et ultra et præter præd. sum. viginti et quatuor mille libr. solubil. præd. JACOBO, tunc DUCI EBORAC. fratri domini (nuper regis) CAROLI SECUNDI, in literis patent. præd. concess. cum hoc etiam quod præd. JOSEPHUS HORNBY verificare vult, quod nec præd. dominus CAROLUS SECUNDUS, nuper rex Angliæ, &c. nec præd. dominus JACOBUS SECUNDUS, nuper rex Angliæ, nec præd. dom. WILLIELMUS et MARIA, modo rex et regina Angliæ, aut eorum aliqui vel aliquis hucusque non solverit seu solvit præfat. JOSEPHO HORNBY aut assignat. suis præd. sum. viginti duar. mille quingent. quadraginta et octo libr. quinque solid. et sex denar. in dictis literis patent. mentionat. seu aliquam inde partem seu parcel. ultra seu præter sum. decem mille libr. existen. confid. in dict. script. relaxat. per præfat. JOSEPHUM * HORNBY præfat. CAROLO SECUNDO, nuper regi Angliæ, &c. ut præfertur fact. et pro qua sum. ipse idem JOSEPHUS HORNBY relaxavit eidem domino nuper regi præd. annual. sum. sexcent. libr. parcel. præd. annual. sum. mille trecent. quinquaginta et duarum libr. septendecim solid. et decem denar. superius mentionat.

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THE ATTORNEY GENERAL to this demurred generally, and the said JOSEPH HORNBY the petitioner joined in demurrer.

THE COURT gave judgment for THE PETITIONER Joseph Hornby.

THE ATTORNEY GENERAL thereupon brought a writ of error in THE EXCHEQUER CHAMBER.

NOTE,

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NOTE, The judgment is recited in the writ of error; which is as follows:

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DOM. rex et dom. regina nunc GULIELMUS et MARIA mandaverunt thesaur. et baronibus de scaccar. suo breve suum clausum in hæc verba scilicet GULIELMUS et MARIA Dei gratia Angliæ, Scotiæ, Franciæ et Hiberniæ, rex et regina, fidei defensores, &c. thesaurario et baronibus suis de scaccar. suo salutem. Quia in record. et process. ac etiam in redditione iudicii loquelæ cujusdam petitionis cujusdam JOSEPHI HORNBY, quæ fuit in curia nostra coram vobis præfat. baronibus nostris de scaccar. nostro præd. Termino Sancti Hilarii anno regni nostri primo exhibit. de allocatione quarundam literarum patent. dom. nuper regis CAROLI SECUNDI præd. JOSEPHO HORNBY et hæredibus suis conf. et solution. cujusdam annual. reddit. per eisd. literas patent. per eundem nuper regem eidem JOSEPHO HORNBY et hæredibus suis concess. solvend. et percipiend. de revention. proficuis et solution. surgen. et provenien. nobis hæred. et success. de pro et ratione debet. excisæ, sup. potum lupulat. et illupulat. et alios liquores necnon arrearag. ejusdem annual. reddit. pro separat. quarter. anni finit. ad festum Nativitat. Domini anno primo supra dict. error intervenit manifestus ad grave damnum nostrum. Ac cum in statuto in parlamento DOM. EDWARD. nuper regis Angliæ tertii, progenitoris nostri, apud WESTM. anno regni sui tricesimo primo tent. edit. inter cæterum concordat. fuit et stabilit. quod in omnibus casibus regem aut alias personas tangen. ubi quis queritur de errore facto in scaccar. cancellar. thesaur. venire fac. coram eis in aliquam cameram consilii juxta scac. record. et process. hujusmodi extra dict. scaccar. et assumptis sibi justiciariis et aliis peritis talibus qualem sibi videbit, fore assumen. vocari fac. coram eis baron. de scaccar. præd. ad audiend. information. suas et causas judiciorum suorum et super hoc negotium hujusmodi debite fac. examinari. Et si quis error invent. fuit illum corrigi et rotulos emendari ac postea eos in dict. scaccar. ad executionem inde faciend. remitt. fac. sicut pertinet prout in eod. statuto plenius continetur. Nos igitur volentes errorem si quis fuerit juxta formam stat. præd. corrigi et celorem justitiam fieri in hac parte vobis mandamus quod sit iudicium inde redditum sit tunc record. et process. præd. cum omnibus ea tangen. coram dom. commissionariis ad custod. sigillum magnum Angliæ et vobis vos præfat. thesaur. in cameram consilii juxta scaccarium præd. [Vocat. THE COUNCIL CHAMBER] die Martis videlicet nono die instantis mensis Februarii venire fac. ut quod dom. commissionarii et vos præfat. thesaur. visis et examinar. record. et process. præd. auditisq; informationibus vestris vos præfat. barones ulterius in hac parte de consilio justitium et aliorum peritor. hujusmodi fieri fac. quod de jure et secundum formam stat. præd. fuerit faciend. T. Nobis ipsis apud WESTM. primo die Februarii, anno regni W. 3. FISH. Alloc. R. ATKINS.

RECORD. et PROCESS. de quibus in BREVI DE ERRORE prædict. fit mentio sequitur, &c.

Et

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Et super hoc GEORGIUS TREBY miles attorn. d. et for. dom. regis et dom. reginæ nunc general. quæ pro eisdem dom. rege et dom. regina in hac parte sequitur. præsen. hic in curia in propria persona sua pro eisdem dom. rege et dom. regina dicit quod in record. et in process. præd. necnon in redditione iudicii præd. de et super præd. morac. in lege manifeste est et rat. In hoc videlicet quod præd. literæ patent. superius recitat. et materia in eisdem content. et specificat. ac præd. materia per dict. JOSEPHUM HORNBY in forma præd. allegat. minus sufficiens. in lege existunt ad ipsos dom. regem et dom. reginam nunc de aut cum solution. denar. prædict. de arrearog. pro præd. separabilibus quarteriis anni aut cum præd. solution. præd. annual. reddit. sive sum. præfat. JOSEPHO HORNBY in forma præd. ontrand. Eo tamen non obstante adjudicat. existit per barones præd. quod præd. literæ patent. præfat. dom. nuper regis CAROLI SECUNDI præfat. JOSEPHO HORNBY, ut præfertur concess. et superius recitat. et irro.ulat. juxta tenorem et effectum earundem ipsi præfat. JOSEPHO HORNBY allocar. Et quod præd. summa quinq. mille oct. gint. et duarum librarum quatuor denar. et un. obol. pro arrearag. dict. annual. reddit. sive sum. septingent. quinquagint. duarum librarum septendecim solid. et decem denar. resid. præd. annual. reddit. sive sum. mille trecentar. quinquagint. duar. librar. decem solidor. et decem denar. in literis patent. præd. mentionat. à præd. festo Annunciationis BEATÆ Mariæ præd. Virginis anno regni dict. dom. nuper regis CAROLI SECUNDI tricesimo quarto usque ad festum et pro festo Natalis DOM. anno primo regni dom. GULIELMI et dom. Mariæ nunc regis et reginæ supradict. sic ut præfertur aretr. et insolut. existen. ipsi præfat. JOSEPHO HORNBY ad recept. hujus scaccar. per man. commissionar. thesaur. et camerar. * ejusdem recept. qui modo sunt et per man. commissionar. thesaur. et camerar. ejusdem recept. pro et tempore existen. de thesauro provenien. accrescen. ex illa parte revention. de le excise in literis patent. præd. mentionat. fore concess. dicto nuper regi CAROLO SECUNDO hæred. et success. suis imperpetuum per actum parliament. fact. anno regni ejusdem nuper. regis. duodecimo in man. eorund. commissionar. thes. et camerar. jam exist. et in manus commissionar. thes. thesaur. et camerar. imposterum existen. solvetur post et ultra annual. sum. necessar. solubil. pro gubernation. [ANGLICE management] dict. revention. de THE EXCISE, et post et ultra annual. sum. attingen. ad duodecim mille ducent. et novem libras quinddecim solid. et unum obol. seu eo circiter in literis patent. prædict. mentionat. fore solubil. exinde annuatim CATHERINÆ nuper reginæ consort. dicti nuper regis CAROLI SECUNDI et modo dom. reginæ dotissæ Angliæ et parcel. juncturæ suæ, et post et ultra præd. summam vigint. et quatuor mille librarum in literis patent. præd. mentionat. fore solubil. JACOBO tunc DUCI EBOR. fratri dict. dom. nuper regis CAROLI SECUNDI; et quod præd. annual. reddit. sive summa septingent. quinquagint. et duarum librarum septendecim solid. et decem denar. resid. præd. annual. reddit. seu sum. mille trecentar. quinquagint. et duarum librarum septendecim solid. et decem denar. in præd. literis patent. mentionat. eodem JOSEPHO HORNBY sic ut præfertur concess. a præd. festo Natalis DOM. anno regni dict. dom. GU-

* [44]

LIELMI et dom. MARIAE nunc regis et reginae Angliæ, &c. primo supradicti ipsi eidem JOSEPHO HORNBY hæred. et assign. suis ad recept. hujus scaccar. per manus commissarior. thes. thesaur. et camerar. ejusdem recept. pro tempore existen. de thesauro de tempore in tempus provenien. accrescen. et emergen. de præd. hæreditar. revention. de THE EXCISE in man. suis de tempore in tempus existen. post et ultra annual. summam necessar. solubil. pro gubernation. [ANGLICE management] dict. revention. de THE EXCISE, et post et ultra annual. summam attingen. ad duodecim mille ducent. et novem libras quindecim solid. quatuor denar. et unum obol. aut eo circiter in dictis literis patent. mentionat. fore solubil. exinde annuat. præfat. CATHERINÆ modo reginæ dotissæ Angliæ ut parcel. junctur. suæ, et post et ultra annual. summam viginti quatuor mille librarum in eisdem literis patent. mentionat. fore annuat. nuper solubil. præfato JACOBO DUCI EBOR. et modo annuat. solubil. dom. regi et dom. reginæ nunc ad præd. separal. festa Anaunciationis BEATÆ MARIE VIRGINIS, Nativitatis SANCTI JOHANNIS BAPTISTÆ, SANCTI MICHAELIS ARCHANG. et Nativitatis DOM. DEI nostri communiter [vocat. CHRISTMAS] per æquas et æquales portiones annuatim solvetur. Et quod tall. toties quoties casus requireret levand. ad dict. recept. scaccar. pro præd. annual. redditu sive sum. septingent. * quinquaginta et duarum librarum septendecim solid. et decem denar. resid. præd. annualis redditus mille trecentarum quinquaginti. duarum librarum septendecim solid. et decem denar. idem resid. redditus seu aliqua inde parcel. deveniret debit. secundum formam et effectum literarum patent. præd. super commissarium thesaurarium, receptor. collector. sive firmarium dict. hæreditariarum revention. de THE EXCISE per officiar. recept. hujus scaccar. pro tempore existen. ad quos levac. tallier. in ead. recept. pertinent seu pertinebit de tempore in tempus ad requisition. ejusdem JOSEPHI HORNBY hæred. et assign. suorum levantur secundum formam effectum et directionem literar. patent. prædict. et secundum cursum dict. recept. scaccar. salvo semper jure regis et reginæ nunc si, &c. Ideo in eo manifeste est erratum; errat. est etiam in hic quod per record. præd. apparet quod judicium præd. in forma præd. reddit. reddit. existit pro præfat. JOSEPHO HORNBY versus eosdem dom. regem et dom. reginam ubi per legem terræ hujus regni Angliæ judicium ill. reddi debuisset pro eisdem dom. rege et dom. regina nunc versus præfat. JOSEPHUM HORNBY. Ideo in eo manifeste est erratum; et sic idem ATTORNAT. GENERAL. pro eod. dom. rege et dom. regina dicit quod in record. et process. præd. ac in recordo judicii præd. manifeste est errat. et super inde idem attornat. dictor. dom. regis et dom. reginæ pro eisdem dom. rege et dom. regina petit quod judicium illud ob errores præd. et alios in record. et process. existen. revocetur annulletur et penitus pro nullo habeatur. Ac etiam breve dictor. dom. regis et reginæ ad præmunien. præfat. JOSEPHUM HORNBY offend. coram præfat. dom. custod. magni sigill. Angl. et domino thesaurario ad certum diem aud. tur. record. ac process. præd. errores, et ulterius ad faciend. et recipiend. quod fuit justum in præmissis, &c. Et ei conceditur, &c.

Super quo idem JOSEPH. HORNBY dicit quod nec in record. et process. præd. neq. in redditione judicii præd. de et super præd. morac.

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roc. in lege in ullo est erratum. Et petit quod Curia dict. dom. regis et dom. reginae nunc hic procedat tam ad examinationem record. et process. præd. quam materiae præd. superius pro erroribus assignat. Sed quia Curia vult advisari in præmissis antequam, &c. ideo dies dat. est partibus præd. in statu quo sicut nunc à die Pasch. usq. in unum mensem proximum anno quarto regni dom. GULIELMI et dom. MARIE nunc regis et reginae de judicio suo inde audiend. eo quod Curia dict. dom. regis et dom. reginae nunc inde nondum, &c. Ad quem diem vener. partes præd. et ob causam præd. habend. diem ulterior. in statu quo nunc usq. in octab. Sanct. Trin. ad judicium suum inde audiend. eo quod Curia hic inde nondum, &c.

* [46]

* TREBY, *Chief Justice.* There are two points in this case:

FIRST, Whether these letters patents are valid in law, and sufficient to bind the king?

SECONDLY, Whether the remedy that these petitioners have taken be proper?

As to THE FIRST, I am of opinion, that the letters patents are valid and sufficient to bind the king. It is objected, that the word "*successors*," in the statute by which this revenue is given, intends that it shall be fixed in THE CROWN, and unalienable. To this I answer, that there are several other statutes by which lands and other revenues were given to the king by the same words that are in this statute; and yet the kings of England had always power to alien them, as appears by *Berkley's Case* (a), by the *statute of Monasteries* and by *Vaughan* (b). So King Charles the Second having an estate of inheritance in this branch of his revenue, had the same power to alien this as he had to alien any other part of it. It has been strongly objected, that if the king should have a power to alien all his lands and revenues, it might be of pernicious consequence to his subjects, and that then our exchequer in England would be like THE SPANISH EXCHEQUER, of which it is said, that it receives taxes and revenues from the general, only to pay them out to some particular persons. To this I answer, that this might be some reason to induce the making an act of parliament to restrain the king's power of alienation; but since here the parliament has thought fit to give the king such a power, we ought to acquiesce and submit to it. But that which I shall chiefly proceed on is the judgment, which I think to be very extraordinary, and such as THE BARONS could not give; for I do not think that they can award the king's treasure out of THE EXCHEQUER.

Then I take this judgment to be very erroneous and deficient in several particulars.

* [47]

* FIRST, It leaves out THE TREASURER, who is the chief officer concerned in disposing the king's money.

(a) Plowden, 234. to 243. (b) Vaugh. 62. See also 2. Roll. Abr. 198.

SECONDLY,

Shin. 601. 611.
Lord Somers
Arg. 128.
5. Com. Dig.
"Pleader"
(3. B. c.).
6. Com. Dig.
"Prærogative"
(D. 87.).
Maddox, 271.

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the barons can
award the King's
treasure out of
the exchequer?

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SECONDLY, The chamberlain of THE EXCHEQUER ought to have been mentioned as well as the treasurer; and so is the judgment in the case of *Nevel (a)* and *Worth (b)*, and also in *Cotton's Records*.

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THIRDLY, This judgment appoints *tallies* to be struck from time to time, and orders the method of payment of the several sums of money, which I take it THE BARONS cannot do; for they seem to undertake to do what is proper work for an act of parliament, which only can appoint THE TREASURER to make payments in such an order (c).

IN THE NEXT PLACE, I take it that this judgment cannot be amended, because these are faults in substance, and the law is very nice and curious in judgments: so if a *misericordia* be entered for a *capiat*, the judgment is erroneous; so is it if it be *concessum est* instead of *consideratum est*, &c. (d).

Now I come to the remedy, which I take to be the great and difficult point of the case. And I am of opinion, that no judgment can be given upon this petition to THE BARONS; for I do not think that the court of exchequer has any power to dispose of the king's treasure, and therefore I cannot see how this judgment can have any effect: indeed it is said, that the petitioner will have a writ to the officers of the treasury, or to THE TREASURER himself, and if they do not obey this *liberate*, that then they will enforce it by action; but this they cannot do, for I hold that the treasurer may choose, upon bare warrant, to pay in what order he thinks fit.

Noy, 89.
3. Rol. Atr.
771. 774.
1. Roll. Rep.
278.
Yelv. 130.
2. Cro. 386.
631.
Hob. 194.
3. Cro. 442.

Then they have shewn no precedent that ever any such action was brought; though indeed my LORD COKE (e) seems to hint at it, and so does *Plowden (f)*, and the *Year Book (g)*; but there the *liberate* always went to the subordinate officer, never to the treasurer himself. By the treasurer, I mean the treasurer of the exchequer, and not the lord high treasurer of *England*; for that great officer has long been discontinued, and when he was in being, the greatest use of him was when he had the honour to be your lordship's colleague in this place (h).

* So that I take it, that THE TREASURER may, if he please, pay these annuities to the petitioners; but whether he will do it or no, is left to his conscience and discretion; but he cannot be compelled to it but by authority of parliament. Then this remedy is not warranted by the course of THE EXCHEQUER: if there were any such usage there, I agree it would be the law of the land,

• [48]

(a) *Plowden*, 378 to 381.

(b) *Plowden*, 457, 458.

(c) *Year Book* 9. *Hes.* 4. pl. 23.

(d) *Latch*, 177. *Poph.* 203. 211.

(e) 4. *Inst.* 116.

(f) *Pl. Com.* 186.

(g) *Year Book* 2. *Hes.* 7. pl. 8, 9, 10.

(h) See 2. *Hawk. P. C.* ch. 2. *Foster*, 140.

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and so is *Rawlins's Case* (a), and *Plowden* (b), but there has been no such usage there; and in this point I concur with my brother LECHMERE, who perhaps has the greatest experience in the court of exchequer of any judge that ever sat there, for I think I lately heard him say, it was sixty years since he practised there. I have reason to think, whatever *Mr. Plowden* says, that these *liberates* were granted upon petitions to THE KING himself, and not to THE BARONS; you may see abundance of them in *Ryley* (c). It appears indeed in *Brooke* (d), that upon delivery of this writ to the officer and assents in the exchequer, an action lay against the officer for non-payment; but that ever it could be brought against the treasurer or chamberlain, was never heard of (e). But, say they, there is a clause in the patent which empowers the treasurer, &c. to make payments, &c. and this they call a perpetual warrant. But this makes against the petitioners; for if it be so, why do they prefer a petition to the barons of the exchequer? If they can have their debt without a petition barely upon this patent, where there is a grant, a command, and warrant to the treasurer and officers to pay the money (which, say they, amounts to a *liberate*), then it is a vain thing to sue in the exchequer for a judgment; for it cannot be presumed that a *liberate* under the seal of the exchequer *teste* CHIEF BARON, should be of more force than a *liberate* under the seal of *England teste* MEIPSO (f).

The power of
the Court of Ex-
chequer over the
king's treasury.

To clear this point, it is necessary to enquire into the power of the court of the exchequer. I do agree that they are supreme auditors, and have authority over the king's treasure; but it is *in transitu*, as upon the sheriffs accounts, or any other of the king's officers concerning the bringing-in of the king's revenues into THE EXCHEQUER; but when the money is there, it is in its center, and THE BARONS have nothing to do with it; they are only conduits, but not products (g); and it would be of dangerous consequence for so many to have to do with * the treasury, lest, as *Vernon* says in his Book (h), there be too many leaks in the cistern. I confess, the court of exchequer does use to enrol charters in the exchequer, and that is the foundation of the accounts, &c. and so is *Plowden* (i). But whether the barons of the exchequer have a power to control and command the treasurer, is a great and arduous point; it is in effect, Whether the barons shall have the power to turn out the treasurer when they please; and whether the petitions that were formerly preferred to the king, shall be now exhibited to the barons of the exchequer? which matters I must own I cannot be brought to imagine, though I

* [49]

(a) 4. Co. 52.

(b) Plowd. 32.

(c) Ryley's Placita Parliamentaria.

(d) Bro. Abr. "Talley de Exche-

quer" T. ver. Eb. 136.

(e) Ante, 14.

(f) Register, 191.

(g) 2. Inst. 181. 4. Inst. 115.

(h) Vernon's Considerations on the Court of Exchequer, printed in 1643; it was republished in 1661 under the title of "The Exchequer Opened," &c. and, except the titles, both books are in every respect the same.

(i) Plowd. Comm. 320.

would

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would think as favourably as possible in this case; for I give this opinion, not because I would, but because I must. But I take this power in the barons, to be against the nature and institution of the court of exchequer; for they are originally empowered by the king to get in his revenue, and it is for the sake of the revenue that they have any thing else to do; and all they do, is to convey the king's treasure to its proper place, but they cannot dispose of it; for there is no correspondence between the barons and the officers of the treasury. Upon reversal of *attainders* we know there is no restitution of the money paid to THE KING; and the reason is, because the barons cannot in such case controul the treasury. I remember several years since there was a solicitor who brought the rolls of a forfeited estate in dispute into court; and they ordered the money to be put into the hands of THE REMEMBRANCER; for they said, that if it was once paid into THE TREASURY there was no getting it out again.

The case in short is no more than this: Suppose THE KING be indebted to THE PETITIONERS, and also to the army, the fleets, &c. now who shall direct the payment of these debts, the barons or the treasurer? who is the best judge of the state of the kingdom and of its necessities? So that suppose there was only four thousand pounds in THE EXCHEQUER, and we were threatened with a foreign invasion, How shall this money be disposed? Says THE TREASURER, To raise men, to pay the army and our fleets, that by their assistance we may prevent the enemy from coming amongst us. No, say THE BARONS, we must pay the bankers with this money, though at the same time we open the gates and let in *Hannibal* to our utter ruin and destruction. My LORD COKE, in treating of the court of the exchequer (a), takes notice of the oaths taken * by THE TREASURER, and also by THE BARONS. In the treasurer's oath it is mentioned, that "he is "to keep and dispense the king's treasure safely;" but in the barons oath there is not a word of this matter taken notice of; which to me is an argument that the treasurer is judge in point of issuing money, whether it be due and payable or not, and to whom, in what manner, and when it shall be paid, &c. And this I take to be the true reason, why no action can be brought against THE TREASURER, because he acts as a judge, and not as a minister of the court, for he is not attendant to it, as sheriffs, bailiffs, &c. are; so I take "it may be paid" is enough for THE BARONS to say; but "must be paid" is only for THE TREASURER to say (b). It is treason to counterfeit the great or privy seal, because they only have to do with the king's revenue; but it was never thought treason to counterfeit the exchequer seal, which has nothing to do with it (c). In the contests heretofore between the king and the people, what was meant when they complained that the king's treasure was mispent and misemployed? Not that it was paid away

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On reversal of
attainders, no
restitution of
money paid to
the king.

* [50]

The treasurer of
the exchequer,
his oath.

The nature of
his office.

Vide Moore,

475.

11. Co. 90, 92.

(a) 4. Inst. 103. to 116.

(c) Plowd. 228.

(b) See Doddington's Case, Cro. Eliz. 545.

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without letters patents, or taken away without the king's grant; but it was this, they blamed THE TREASURER, because he paid away the king's treasure to persons unworthy, to minions and favourites, though they had grants from the crown by letters patents. But yet it was left to THE TREASURER's discretion to have paid them or not; which he should not have done, when, perhaps, the public good required it.

Now I come to the authorities in our books. I shall begin with the *Year Book of Edward the Third* (a), and *Book of Assizes* (b), wherein it is said, by THE CHIEF BARON, that we shall take consue-
[51]
fiance of all matters that may turn to the king's advantage, but not a word concerning the disposal of the treasury, and the *Year Book of Henry the Sixth* (c) and *Roll* (d) are express. So in the case of *Stradling v. Morgan* (e) it is said, that no pleas shall be held in the exchequer but for the advantage of recovery of the king's debts, and bringing in his revenues; so that the common pleas in the exchequer are only founded on the getting in of the king's revenue. I choose to cite *Mr. Plowden*, because his book is so mightily relied on by the other side; I mean the cases of *Nevill* and *Wroth* (f). I believe it was the authority of those cases that raised all this dust, but I shall answer them by and by, and at present shall only observe, that there is not one law-book that * gives these cases the credit to mention them, I mean as to this point of proceeding by petition to the barons, &c. So in the *Earl of Devonshire's Case* (g) there is no notice taken of *Nevill's Case* (h), and *Wroth's Case* (i), though there was opportunity enough to have mentioned them, if they thought they had been of any weight and authority. So in *Roll's Abridgment* (k), and in *Roll's Reports* (l), the resolution in the *Earl of Devonshire's Case* (m) is cited, but not a word of *Nevill's Case* (n), or *Wroth's Case* (o).

In the next place I shall mention some treatises concerning the court of exchequer.

FIRST, There is *Gervasius Tilburienfis* (p), who sets forth the jurisdiction of the court of exchequer, but mentions nothing of this power in THE BARONS to controul the treasury. The *capitalis justitiarius Angliæ* had indeed a controul over THE TREASURER himself, as appears from *Spelman* (q). So when *Hugo de Burgh*, who was the last great justiciary, was in disgrace, he was charged to render an account of the mispending of the king's revenue; which

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| (a) 2. <i>Edw.</i> 3. pl. 25. | (i) <i>Plow.</i> 452. |
| (b) 38. <i>Assize</i> , pl. 20. | (k) 2. <i>Roll. Abr.</i> 260. |
| (c) 19. <i>Hen.</i> 6. pl. 62, 63. | (l) 2. <i>Roll. Rep.</i> 180. 183. |
| (d) 2. <i>Roll. Rep.</i> 301. | (m) See <i>Moor</i> , 476. 2. <i>Inst.</i> 559. |
| (e) <i>Plowden</i> , 207. | <i>Litt. Rep.</i> 51. |
| (f) Sir Henry <i>Nevill's Case</i> , <i>Plowd.</i> 377.; and Sir Thomas <i>Wroth's Case</i> , <i>Plowd.</i> 452. | (n) <i>Plowd.</i> 377. |
| (g) 11. <i>Co.</i> 92. | (o) <i>Plowd.</i> 452. |
| (h) <i>Plow.</i> 377. | (p) <i>Gervasius Tilburienfis de Rebus in Scaccario Gestis.</i> |
| | (q) <i>Spel. Gloss.</i> 71. 331. |

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shews that he had a power over THE TREASURER : but ever since this great office has been discontinued THE TREASURER has acted according to his own discretion. The next book that I shall quote is called the *Diversity of Courts* (a) ; it is mentioned in my *Lord Coke's Preface to the Tenth Report* : but there is nothing of this power in THE BARONS mentioned there. Neither is it taken notice of in the *Mirror* (b), in *Fleta* (c), in *Britton* (d), in *Crompton* (e), which book was printed fifteen years after *Mr. Plowden's*, nor in the *Second Institute* (f), nor in the *Fourth Institute* (g), where the full authority of this court is fully set forth. And I cannot but also observe, that *Mr. Prinn*, in a book which he printed on purpose to animadvert on my *Lord Coke's Fourth Institute* (h), does not take notice of any such power. I shall beg leave also to mention *Mr. Vernon* (i), and *Mr. Cambden* (k), and *Sir Tho. Smith* (l), who were great and learned men, though their books, I confess, are not of authority : but if there had been any such power in THE BARONS of the exchequer, it is probable they would have taken notice of it. Next, there are *Savil's Reports*, *Lane's Reports*, and my brother *Hardress's Reports*, which treat chiefly of THE COURT OF EXCHEQUER ; but yet they give not the least countenance to any such power : so in 1. *Roll. Abr.* 538, 539. in *Lane's Case*, 2. *Co.* 16. 2. *Roll. Rep.* 294. there is not one syllable of it.

* I shall conclude this point with this observation, that since there were two great powers in the barons (as is pretended), one of bringing in money into the exchequer, and the other of paying it out, that yet these books should be all silent as to the greatest power of paying it out, is very strange and unaccountable ; which indeed does induce me to believe, that there is no such power in the barons, and that those petitioners have mentioned in their petition the only way of having their annuities ; that is, as their former payments were made, viz. by warrant from the lord treasurer.

* [52]

Now I come to the objections.

FIRST, They quote *Ryley's Placita Parliamentaria* (m) ; but if I can apprehend them, those words make against the petitioners. Then *Margery Parker's Case* (n) was mightily insisted on, and indeed at first I thought there was something in it ; but upon a strict perusal I find it is consistent enough with my opinion : in-

(a) Originally published in French in 1525 ; but there is an English edition of 1646.

(b) Horne's *Mirror of Justice*, cap. 1. f. 14.

(c) *Fleta*, lib. 2. c. 25.

(d) *Britton*, ch. 2. f. 6.

(e) *Crompt. Jurisdiction of Courts*, 105.

(f) 2. *Inst.* 551.

(g) 4. *Inst.* 102.

(h) Published in 1669.

(i) *Vernon's Considerations on the Court of Exchequer*.

(k) *Cambden's Britannia*.

(l) *Smith's Commonwealth of England*.

(m) *Ryley*, 251. 253. 257. 261. 337. 526 529, &c.

(n) *Year Book*, 9. *Hen.* 6. pl. 12, 13.

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decd BABINGTON mentioned there a remedy by petition to the barons, but this was only a word slipped out; but the Court gave no regard to it, and were of opinion against it, that there was no such remedy. And it is observable, that *Brook* in his *Abridgment* takes no notice of BABINGTON's opinion, though he does of all the rest of the case. The next thing objected is, that the barons do every Term send a *liberate* to the officers of the treasury under the exchequer-seal to pay money for paper, pens, and other necessaries for the court of the exchequer; the charge of which, I am told, comes to two or three hundred pounds a-year. To this I answer, that first this writ goes without any judgment at all; so that according to this, the petitioners needed not to have had any judgment; but the true reason of issuing forth this writ is grounded on this: In the treasurer's commission there is this clause, that he shall pay out such sums of money as are required *pro necessariis scaccarii*: but of this writ they take no further notice than as a certificate when they make up their accounts.

Now for the precedents.

* [53]

The court of exchequer is guided by multitudes of precedents (a); but here they have not one precedent for such a power over the king's revenue, to which the law has so great a regard; for there is nothing in the law so fenced, so guarded, and so secured, as the king's inheritance: * where that is concerned, there must be *petition of right*, an inquisition found, besides searches, &c.; so careful is the law of the king's inheritance and revenue. But now here the king must lose his freehold without trial, which his subjects shall not do, as appears by *MAGNA CHARTA* (b).

In the next place I shall answer the cases, which indeed give life to the present case, and are the foundation of it. FIRST, as to *Nevill's Case* (c): I observe the petitioners counsel do not agree in their title to it: some say, it was grounded on a *petition of right*; others, that it was a *monstrans de droit*; and others, that it was a complaint against the officers of the treasury. But true it is, that *Mr. Plowden* is precise and expresse in the point, though it seems to me to be but his own private opinion; and I must take the boldness to say that he is mistaken, as will appear from these books, 13. *Hen. 7. pl. 15.* 4. *Edw. 4. pl. 23. b.* 1. *Leo. 190. 1. And. 253.* *Savile, 125.* all which cases happened but twelve years after *Nevill's*, and yet are contrary to it. By the same books and the same reasons it appears, that *Wroth's Case* (d) ought to have no more weight than *Nevill's*, &c.

(a) *Line's Case*, 2. Co. 16. *Moor*, stat. 5. c. 4.; the 28. *Edw. 3. c. 3.* 565. *Kemp v. Barnard*; *Cro. Car.* the 52. *Hen. 3. c. 22.*; the 15. *Rick. 1. c. 12.*; and the 16. *Rich. 2. c. 2.* 513. *Plowd. 230. 320.* 2. *Roll. c. 12.* 524. *Cro. Car. 528.*

(b) 9. *Hen. 3. stat. 1. c. 29.*; the 3. *Edw. 1. c. 24.*; the 25. *Edw. 3.*

(c) *Plowd. 377.*

(d) *Plowd. 452.*

Therefore

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Therefore I conclude, that this judgment given by the barons of the exchequer is an erroneous judgment, and ought to be reversed.

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HOLT, Chief Justice, contra. In this case there have been two points made:

FIRST, Whether this grant be good?

SECONDLY, Whether there be a proper course taken by the patentees?

There has indeed been A THIRD POINT started by my brother who argued last, and that respects the entering of the judgment.

As to THE FIRST QUESTION, I hold the grant to be good, and all who have argued here have concurred in the same opinion. I do confess, that this is the great point of the case, and so much has been said to it that little more can be added; but I must say something to it, though I cannot but repeat. I hold, that King Charles the Second might charge this branch of his revenue; and my reason for my opinion is but short. * It is, because the king was seised of an estate in fee of this revenue; for to such an estate a power of alienation is incident (a). And I take it to be the intent and the express words of the act, that the king should have a right and liberty of alienating and charging this estate. It is no objection, that this revenue was given to the king under a trust; for notwithstanding that he might alien it. So several kings of England have founded corporations of charitable uses, and yet these persons incorporated might, notwithstanding such trust, alien their estates; so may dean and chapter theirs; so may a bishop with the consent of dean and chapter; so a parson, with the consent of the patron and ordinary, might have aliened the land of which he was seised in the right of his church; but the king has nobody required to consent to his alienations. To say that he may alien by the consent of the estates of the realm, is as much as to say he cannot alien without an act of parliament, which he may clearly do. And indeed this revenue comes to the king by purchase; for he gave a recompence for it, viz. part of his standing revenues, it being the profits that did arise from his wards and liveries. But it is objected, that this power in the king of alienating his revenues may be a prejudice to his people, to whom he must recur continually for supplies. I answer, that the law has not such dishonourable thoughts of the king as to imagine he will do any thing amiss to his people in those things in which he has power so to do. But that which I insist on is, that it is absurd in its nature to restrain the king from a power of aliening his revenues of which he is seised in fee. It is against the nature of the being of a king that he should have less power than his people; for before he was king he had power to alien. Now when the crown descended upon him he is seised in jure coronæ, and shall he then have less power

Comb. 270.
271.

* [54]

Whether, and in what cases, the king may alien his revenue.

That the law will not permit the king to do wrong to the subject, et a fortiori to the whole kingdom.

Vide Co. Lit. 19. b.
2. Inst. 681.
1. Co. 44. b.
7. Co. 12. b.
11. Co. 72.
1. Roll. R. 167.
Noy, 182.
Mo. 416.
Godb. 317.
Dav. 75.
Cro. Arg. 60.
Flo. 246. 487. b.
13. E. 4. 8.
1. H. 7. 90.

(a) Littleton's Tenures, sect. 360.

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2. Sid. 137.
142.
1. Hale, 61.
101.
Co. Lit. 16.

• [55]

Ancient demesne
lands alienable,
because posses-
sed by the king
in his personal
capacity.

over those very lands than he had before the descent of the crown? Shall he now be disabled to alien by being a king? This would be against a common principle of law, that the descent of the crown takes away all disability (a). Then it is repugnant to the constitution of the government. Suppose a king should be under a present danger of being invaded, if the king could not raise money by alienating his revenue the nation might perish; for he cannot otherwise raise money than by an act of parliament, for which there might not * be time: and therefore heretofore the kings of *England* have borrowed several sums of money by mortgaging their lands (b). And there ought to be a power in all governments to reward persons that deserve well, for rewards and punishments are the supporters of all governments; and it has been the constant usage of the kings of *England* to reward persons deserving of the government out of the crown revenues, by pensions, and giving estates to support the titles of earl and other dignities (c). And this has been allowed of by act of parliament, as appears by 34. *Hen. 8. c. 20.* But some perhaps will say, that I have been talking little to the purpose, for that they do not deny that the king might alien his own demesnes, or any lands that come to him by descent or purchase; but, say they, this revenue was settled by act of parliament on the crown, and therefore it cannot be aliened. But I do not find any such distinction in our law books, nor any authority from common or statute law that restrains the kings of *England* from aliening any sort of their revenues. As for the lands in *ancient demesne*, they seemed most appropriated for the king's use of any of his revenues, for they had several privileges all relating to the king; as not to be impleaded out of the manor, to be free of toll for all things concerning their sustenance and husbandry, not to be impanelled on any inquest; and yet, notwithstanding all this, those lands were always alienable; and if these lands were alienable, What estates in the crown are not alienable? And our books do take notice that these estates are alienable (d). Then what reason can be given why some estates should be aliened, and others not? Why may not the king as well alien these estates as he may the flowers of his crown, as appears in the *Abbot of Strata Marcella's Case* (e)? for he may grant a county palatine, which has *jura regalia*; so he has granted a power to pardon treason or felony, &c. Indeed these prerogatives are re-assumed to the crown by the statute 27. *Hen. 8. c. 24.* but the grants were not void. Then if an estate be settled on a subject by act of parliament, it will not be denied but that he may alien such estate; and why shall not the king have the same privilege? It appears in fact, that he has always done it: so all the lands that

(a) Plowden, 105. Dyer,

(b) Cotton's Post. 175.

(c) Selden's Titles of Honour, p. 838.
and Calvin's Case, 7. Co. 12.

(d) Fitz. Nat. Brev. 13. 166. and

222. Staundford Prerogativa Regis,

38. 4. Bac. Abr. 205.

(e) 9. Co. 25. Moor, 474. Palm,

78. 1. Mod. 232. 4. Bac. Abr.
205.

belonged

belonged to the abbies and monasteries were aliened by the * king, and yet they were given to him by act of parliament, and by general words, as it is here : so the customs have been always granted and charged by the king, and yet they were granted to him by act of parliament. The authorities in our books are full to this purpose ; as the *Year Books* 21. Ed. 3. 47. 29. Ed. 3. *Plowd.* 1, 2. 4. *Inst.* 45. *Davis*, 7. 14. *Knighton*, 1684. But it is objected, that this revenue was given in lieu of inheritances that were unalienable, viz. the wards, liveries, purveyances, &c. though how the nature of these inheritances can affect inheritances of another nature I cannot see ; but even these inheritances were always in effect alienable, for they might have been released. The king may grant to be free of prisage, *Sir Thomas Waller's Case* ; and so were services in capite, and purveyances, &c. Some opinions have been urged which say, that the crown revenues could not be aliened, as *Fleta* and *Bracton* ; but these books are only ornaments to the law ; they are not looked on as authentic, especially where the practice has been always to the contrary ; but *Britton* (a) is otherwise, and so is *Selden* (b). And *Bracton* himself seems to be of another opinion where he says (c), that " even *res sacre* are alienable by the common law, though " perhaps by the canon law they are not to be aliened." So the statute of *Bigamis* also admits, that the king may grant away his revenues. *Fortescue*, in his book *de Laudibus Legum Angliæ*, says, " that the government is not only *regal*, but *legal* and " *political* ;" and then discourses of the particulars wherein the *regal* power is restrained ; and if our constitution had been so that the king could not alien his lands or revenues, it cannot be imagined but that he would have mentioned a thing so remarkable, especially in a time when there were so many grants made by the crown ; though indeed at that time there were many acts of resumption made, as there were before and after ; as in the reign of *Henry the Fourth* (d), and in the time of *King Henry the Eighth*, &c. which are a great demonstration that those grants could not be revoked or avoided but by act of parliament. It is objected, that the *fee-farm rents* in the time of *King Charles the Second* were granted by act of parliament ; but they might have been granted without that act ; it was only made to encourage purchasers, to make good the letters patents beyond all scruple, and to give power to sue for the arrears of rent, and to distrain, &c. * Then it is objected, that if this grant of the revenue should be alienable to the subjects, that then the king's officers of excise would be the subjects officers. But that does not follow, they are only a means to convey to their fellow-subjects their right, and that which is granted to them by the king's letters patents. So the justices in *eyre*, and of *oyer* and *terminer*, &c. are the king's justices ; and yet they convey justice

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27. Hen. 8.

c. 28.

31. Hen. 8.

c. 13.

32. Hen. 8.

c. 24.

Skin. 602.

Fee-farm rents
granted by act
of parliament,
and why.

Skin. 607.

1. Lev. 29.

Plowd. 214.

* [57]

(a) Britt. 87.

(b) Selden, 549. and 552.

(c) Bracton, bk. 2. c. 57.

(d) Year Book 6. Hen. 4. pl. 14.

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Remedies to re-
cover against the
king.

Skin. 608.

Petition of right,
the nature of it.

Monstrans de
droit, where it
lies.

* [58]

Power of the
barons of the
exchequer to
answer de-
mands.

to the people. 4. *Inst.* 162. As for these letters patents them-
selves, it is plain by the whole tenor of the patents that the king
was not deceived in his grant; and the consideration being exe-
cuted, though it be false yet that will not avoid the grant. *Pl.*
554. So that I conclude this point, that these letters patents
which charge this branch of the revenue are good and firm in law.

I come now to THE SECOND POINT, and that is concerning
the remedy taken by the patentees. And I hold they have taken a
very proper and legal remedy. We are all agreed that they have
a right; and if so, then they must have some remedy to come at it
too. The remedies at common law to recover against the king

were by *petition*, or *monstrans de droit*. Indeed there is a new
remedy now given by the statute 2. *Edw.* 6. c. 8. and that is by
way of *traverse* to the king's title. 4. *Co.* 54. 2. *Inst.* 688

But FIRST, a *petition of right* is not necessary in this case; not
but that a man may proceed in this way, and admit himself out of
possession if he please. But it is not necessary for two reasons:
FIRST, Because a *petition of right* is grounded always upon a
naked matter of fact suggested, and not of record; and upon such a
suggestion there is a commission issues out of chancery (a).
But here the title is derived by letters patents, which are of record;
so that here is no matter of fact to be enquired of. SECONDLY,
The patentees do not endeavour to destroy the king's title; but
petitions of right do so, and are generally inconsistent with the
king's title. Then this annuity is not turned to a right, as if
there had been an attainder, &c.; therefore why should there be
a *petition of right*? I take this remedy to be by a *monstrans de
droit*; and this remedy is to be sued at common law, when the
party's * title appeared of record (b). A *monstrans de droit* or
ouster le maine (which is all one in effect) always lies where the
title or right of the king appears, as well by matter of record as the
king's title; and this appears fully in *The Sadlers Case* (c). Also
it is plain, that a *monstrans de droit* lies in THE EXCHEQUER: I
think there is no doubt of that. It is objected, that the *petition*
should be first sued to the king; but by the records in *Ryley* (d)
it appears that these *petitions of right* have been sued to the court
of king's bench. But indeed this *petition* differs from those; for
this being only the way of complaint, there needs no indorsement,
as in the other cases.

THE NEXT OBJECTION is, that in this precedent there was a
liberate. This writ is in its nature a *writ of allowance* (e); but
this writ does not give any manner of jurisdiction, for the court
may hold plea, and proceed without it. But the next answer that
I give to this, and which may be satisfactory to any body, is the
statute of 5. *Rich.* 2. c. 9. which directs THE BARONS OF THE
EXCHEQUER to answer every demand, without any *writ* or *letter*
from the king; so is 4. *Inst.* 110. So that I take it to be very

(a) Year Book 9. *Hen.* 4. pl. 4.
Co. Ent. 462.

(b) Keilway, 178.

(c) Hob. 334. 4. Co. 54.

(d) Ryley's Placita Parliamentaria,
257. 351. Staundford, 72.

(e) Register, 192.

plain,

plain, that the barons might proceed here without any writ at all.

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BUT IT IS OBJECTED, that the writ should have been directed to the treasurer, &c. But this needs not be; for the treasurer has nothing to do with civil pleas (a). Indeed *Fitzherbert* (b) mentions the treasurer; but that is a common error, and the writs need not be so directed. It is true, as my *Lord Coke* observes, that the legitimation of any case may be suspected that has no case of kin to it; and I agree to that rule: but I think I have found out some kindred to this present case, and that is the case in *Coke's Entries* (c); for there THE BARONS did allow certain liberties, and also the payment of a rent-charge granted by the king to my *Lord Hunsdon*. So the case of *Margery Parker* (d) is a considerable authority to this point: she had an annuity out of the *magna, custuma* of *London*, granted by the queen, out of a sum assigned for her dower, to receive of the customers; the queen shall not have action against the customers, but must sue to the barons of the exchequer; * and *Margery Parker* may sue for it in the exchequer in the same manner as the queen might for her portion. Then there is my *Lady Broughton's Case*, which happened in the twenty-fifth year of *Charles the Second*. My *Lady Broughton* forfeited the keeper's place of THE NEW PRISON to the king, who thereupon made a seizure; upon this the dean and chapter of *Westminster* came into the court of exchequer and claimed the inheritance, and the king's hands were removed. Indeed this matter was first stirred in the king's bench, for they gave judgment to seize the prison. Now if the court of king's bench might hold plea there of a *monstrans de droit*, because the seizure was there, why may they not as well proceed in THE EXCHEQUER by *monstrans de droit*, because the money is there? It is true, money comes into and issues out of THE EXCHEQUER without the barons; but, with submission, the right of bringing in and issuing out of the money belongs to the barons; and if you make the barons only judges of the right of coming in of the king's money, you make them judges but of half their business which belongs to that court; for the barons have the judicial power over the whole court of exchequer. And to say that the treasurer and his officers have no correspondence with the barons is not true; for all the books take notice of them as persons that all belong to the exchequer. Some have objected, that this court ought regularly to hold pleas only where the king is party, and that this court used to be prohibited to proceed in any pleas that do not concern the king; and in 2. *Inst.* 551. there you may see what pleas they may hold. But here the plea does concern the king; for here is the king's grant, and the suit is to the king; and this determination of the barons in this case is not thus any judgment of their own, but the king himself, by reason of such his letters patents, has obliged himself to make such payments. As in the case of an

* [59]

(a) Register, 137.

(b) Fitz. N. B. 139.

(c) Co. Ent. "Claim of Liberties," 93.

(d) In 9. Hen. 6. pl. 13.

obligation

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obligation where debt is brought upon it, and a recovery is had; it is not so much the judgment of the Court that binds the property as the obligor himself, who by his bond has subjected his property to be determined by the judgment.

* [60]

Court of aug-
mentations.

Now as to the authorities which seem directly to govern this point, and the objections against them. There is *Sir Thomas Wroth's Case*, in *Plowden* (a), which I rely upon as a clear and full authority in this case, notwithstanding all the objections that have been made against it. * *King Henry the Eighth* had appointed *Sir Thomas Wroth* to be gentleman-usher of the privy-chamber to *Prince Edward*, and he granted to the said *Sir Thomas*, for the exercise of the same office, an annuity of twenty pounds, to be had and yearly taken to the said *Sir Thomas* from *Lady-day* then last past during his natural life, by the hands of the treasurer of his court of augmentations of the revenues of the crown for the time being, of such his treasure of the same revenues as should remain in the hands of the treasurer at two times in the year, &c. The chief objection against this case is, that there the grant was under the seal of THE COURT OF AUGMENTATIONS, which was incorporated with THE COURT OF EXCHEQUER; but that I deny, for that court was never legally united to THE COURT OF EXCHEQUER, as was adjudged in *Dyer*, 216.; so that the objection, that *Sir Thomas Wroth's* grant was under the seal of the augmentation court, and under the survey of it, is gone. Then it does not appear to me, that ever the court of augmentations had any power expressly given them to relieve the grantees of such rents. I have looked over the act of parliament by which that court is constituted, but I cannot find any such power: but I think the court of augmentations did proceed in such manner that it might be also reputed a court of exchequer; and the court of augmentations is by express words made a court for the new revenues that should come to the crown, which are exempted from the jurisdiction of the other court; but that which I infer from hence is, that if this new court of exchequer did in some cases relieve grantees of rents, &c. certainly the old court of exchequer shall have the same privilege. There are other courts which have also proceeded in the same manner; as THE COURT OF WARDS did usually hold plea of these matters. *Queen Elizabeth* granted to *Allen* (b) under her great seal an annuity of forty pounds a-year, to be paid by her receiver of THE COURT OF WARDS: this being payable by the receiver is in the nature of a rent-charge. So THE COURT OF SURVEYORS, erected by 33. *Hen.* 8. c. 39. proceeded in the same manner, and relieved grantees of rent-charges, &c. As to *Nevill's Case*, also in *Plowden* (c), I take it likewise to be a full authority in point. An yearly rent-charge of three pounds ten shillings was granted to *Sir Henry Nevill*, and another for the exercise of the office of keeper of a park out of a manor for their lives; one is attained; the manor comes to the possession of the king; the king shall neither have the office nor the rent; and the arrears of the said

(a) *Plowd.* 452.

(b) *Cro. Jac.* 78.

(c) *Plowd.* 377.
annuity

annuity were paid to *Sir Henry Nevill* at the * receipt of the exchequer by the hands of the treasurer and the chamberlain.

First, I grant that those lands were also under the survey of the court of augmentations ; but that, I conceive, makes nothing against me, for the reasons before-mentioned.

There are several other records which have been already quoted, but I shall not trouble you with the repetition of them. I shall only mention some few which I think have been omitted ; as, in Trinity Term, in the first of *Queen Mary*, Roll 126. ; in the second of *Elizabeth*, Roll 145. ; *Michaelmas Term*, 13. *Queen Elizabeth*, Roll 347. ; *Hilary Term*, 13. *Elizabeth*, Roll 143. ; *Easter Term*, 1. 2. Roll 108. In all these records it also appears, that money issued out of the exchequer by order of the court of exchequer ; and it is highly reasonable that they should have such a power. Suppose the king purchase land that is charged with a rent, the king must take the land together with its burden ; but in such case it would be too hard to drive the grantee of the rent to his petition of right to the king ; no, certainly he may come to the court of exchequer by way of petition to the barons, who may give him relief.

It has been objected, that money which once comes into the exchequer can never be taken out, *Reg. 193.* But if this be true in a general sense, that none of the king's revenues that are brought into the exchequer can be paid out, it would destroy all annuities, rent-charges, and other payments, which the crown is obliged to make. It is true, if a man be outlawed in the king's bench, and the party's goods are seized into the king's hands, and then the outlawry is reversed, there can be no restitution (a). The reason of this is, for that the court of king's bench cannot send a writ to the treasurer ; and the court of exchequer have no record before them to issue out a warrant for a restitution. So if an attainder be reversed, the mean profits taken into the exchequer cannot be restored for the same reason ; and also for that the king cannot be made a disseisor, and the statute gives a remedy only as to parliament.

There remains after all a great objection, had it any weight, and that is, *Cui bono* ? If the patentees should have judgment for them, what will it signify, if they cannot come at any money ? As to this I do think, that as soon as the writs are delivered to the officers of the exchequer, I mean the treasurer and chamberlain, the property is altered, and the officers become debtors to the parties, as appears by 2. *Hen. 7.* So as soon as a *fieri facias* is delivered to the sheriff, and upon it * goods are levied, the property of the goods is altered, and the sheriff becomes a debtor to the plaintiff. So an action of debt will lie upon a *liberati* ; and so it has been adjudged.

I shall only observe one thing more, and so conclude, and that is in answer to my brother who argued last ; for he struck very hard at the judgment given by the barons. He thought that it

(a) But see *Cro. Eliz.* 228. 2. *Vern.* 312. *Bunb.* 105.

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Money issuing
out of THE EX-
CHEQUER by
order of THE
EXCHEQUER.

Restitution of
outlawed goods,
and on attainder.

Action of debt
on a *liberati*,
and why.

Ante, 13. 14.
48.
Skin. 257.
1. *Salk.* 323.
1. *Vern.* 95.
2. *Saund.* 47.
344.

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THE KING
against
HORNBY; OR,
THE BANKERS
CASE.

was very erroneous, and therefore void; but, with submission, I take this judgment to be as well as it can be: and whereas it is said in the judgment, that the money shall be paid by commissioners and chamberlain of the treasury, it must be understood of the receipt of the treasury, and not of the lord high treasurer, which office is long since expired.

As for the levying of the tallies mentioned in the judgment, it does not hurt; it is at most but surplussage. But that which I insist on is, that though this judgment, in respect of form, or any material point of it, should be erroneous, yet if your lordship should be of opinion in the two first points with me, you will then give a new judgment, such as the court of exchequer ought to have given; for that is the law of this place, as appears by 31. *Edw. 3.* And this last point was so ruled upon a debate in the house of lords, and was the case of *The King v. Saintbell*, in the thirtieth year of *Charles the Second*.

So that upon the whole I AM OF OPINION, that the judgment given by THE BARONS ought to be affirmed.

But afterwards SOMERS, *Lord Keeper*, was of opinion to reverse the judgment, and accordingly it was reversed. The ground upon which he gave his opinion was, that the patentees had not taken a proper remedy by PETITION to THE BARONS, who have no power or controul over the king's treasury, &c. and that their only remedy was by PETITION to THE KING himself. He insisted much upon the same reasons and grounds which TREBY, *Chief Justice*, went on (a).

(a) SOMERS, *Lord Keeper*, distinguished himself upon this occasion by one of the most elaborate arguments ever delivered in WESTMINSTER HALL, edit. 1733. in 4to.; but a majority of the Judges who argued in the exchequer chamber were unanimously of opinion on the first point, that the grant out of the excise was good, and a majority of them concurred with HOLT, *Chief Justice*, against the opinion of TREBY and LORD SOMERS, that the petition to the barons of the exchequer was the proper remedy. A question therefore was made, Whether the opinion of the majority of the Judges should prevail? or, Whether they were mere assistants to the LORD TREASURER and LORD KEEPER? And on this point being referred to THE TWELVE JUDGES, seven against three held, that the LORD TREASURER and LORD KEEPER were not concluded by the opinions of the Judges, and therefore that the LORD KEEPER, there being no LORD TREASURER might give judgment in this case according to his own opinion; and accordingly LORD SOMERS reversed the judgment of THE COURT OF EXCHEQUER. But the case was afterwards carried by writ of error into Parliament, when the judgment of the court of EXCHE-

QUER CHAMBER was reversed, and the judgment of THE COURT OF EXCHEQUER affirmed. 11. St. Trials, 137. But it was enacted by 12. & 13. Will. 3. c. 13. s. 15. "That in lieu and discharge of the perpetual annual payments, and of all arrears thereof, granted by *Charles the Second* out of the hereditary excise, the said excise should be charged with the payment of three per cent. per annum on the principal sums due to the respective patentees, subject to be redeemed on the payment of a moiety of the principal sums mentioned in their patents." The moiety of this debt due to the bankers amounted to the sum of 664,263l. By the statute of 3. Geo. 3. c. 7. this sum was provided for to be subscribed into a joint stock of annuities at five per cent. per annum, redeemable by parliament, and transferable at the Bank. Many of these debts, however, remained unclaimed, and in the year 1726 there remained in the exchequer the sum of 10,725l. 5s. 3d. which had been referred to answer the annuities on such unclaimed DEBTS. By 13. Geo. 1. c. 3. the said sum is directed to make a part of the sinking fund, and to be applied towards the redemption of the annuities, as directed by the act.

MICHAELMAS

MICHAELMAS TERM,

The Seventh of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Thomas Rokeby, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* *Bush against Allen.*

* [63]

Cafe 23.

THE point is this : A man devises to *Jane Shore*, the wife of *J. S.* the issues and profits of certain lands to be paid by his executors.

If a testator devise the issues and profits of certain lands to his wife, to be paid to her by his executors, the executors shall take the lands in trust to receive the rents and profits to the use of the

The question is, Whether this be a devise of *the land* to her for life ; or whether the executors shall receive *the profits* to the use of the devisee ?

HOLT, *Chief Justice.* " To be paid by the executors to her " shews the testator's intent that the husband should have nothing to do with it (a). Why should not this be a devise to the executors

wife.—S. C. post. 101. S. C. 1. Salk. 218. S. C. Comb. 375. Yelv. 73. Cro. Eliz. 674. 734. Cro. Car. 368. Allen, 45. Carter, 25. 2. Vent. 57. Lut. 824. Salk. 679. 3. Lev. 259. 3. Atk. 481. 5. Bac. Abr. 381. 2. Chan. Rep. 117. Cowp. 43. 299. 1. Term Rep. 346. 4. Term Rep. 89.

(a) A testator devised lands in trust to pay the *rents and profits* to his daughter (whose husband was then living) for her life, notwithstanding her coverture, and not to be subject to any controul, &c. of her husband, nor liable to any debts which he had or should contract ; afterwards the deviser made a codicil, taking

notice of the death of the daughter's husband, in which codicil he ratified and confirmed his will. And it was held, that the intention of the testator clearly was, that his daughter should enjoy the estate free from the controul of any husband, Beable v. Dodd, 1. Term Rep. 193.

for

**Bain
against
ALLEN.**

for her life, upon trust to pay the profits to her? And this is fully to perform the will, the intent of which was to exclude the husband wholly.

Adjournatur.

At another day,

HOLT, Chief Justice. The question is, Whether this is a devise of the lands to his wife for her life, and that the other words shall be void; or whether it shall be to the executors for her life? It seems to me to be a devise to her; for a devise of the rents and profits is a devise of the land itself; and if this shall not be construed a devise to her, then the last words contradict the former; and then you will make a devise by implication to the executors against an express devise before.

• [64]

ROKEBY, Justice. But then the husband shall intermeddle where the devilor intended to exclude him. I rely upon the case of *Griffith v. Smith* (a): A man possessed of * a term for years of lands, devised the profits thereof for so many years as he should live; and after he devised the profits thereof to twenty of his poor kindred; and that after the death of his wife the lands should be let by the advice of his overseers, and the rent distributed to his said poor kindred; and made his wife executrix: and it was resolved by all the Judges in the exchequer chamber, that although a devise of the profits be a devise of the land itself, if there be no other circumstance in the case, yet because the devisor had declared, that the poor kindred should not have the property of the term, and he had appointed a lease to be made for rent, the executor had the term upon the consideration to make the lease and distribution, and the poor kindred had only a trust, and no interest.

HOLT, Chief Justice. In that case it remained in the executor, and not in the devisees.

EYRE, Justice. I think the subsequent words make it a devise to the executors in trust for the wife.

JUDGMENT for the defendant, **HOLT, Chief Justice, dissente (b).**

(a) Moor, 753.

(b) Salkeld says, that **HOLT, Chief Justice**, seemed strongly to incline, that the executors were trustees for the wife, S. C. 1. Salk. 228. It appears, however, that he was afterwards of opinion,

that it was a devise of the land to the wife. But the other Judges were of a contrary opinion, S. C. Comb. 375.; and in Trinity Term, 8. Will. 3. judgment was given for the defendant.

Lady

Lady Gerard against Lord Gerard.

Cafe 24.

LADY GERARD brought a writ of dower, and demanded the third part of a capital messuage called Bromley Hall.

The defendant pleads, that time out of memory it had been called as well by the name of Gerard's Bromley as Bromley Hall, of which Sir Thomas Gerard, Knight, was, in the first year of James the First, seised in fee; and was by the said King James created Lord Gerard, of Gerard's Bromley, he being resident and commorant with his family in the said capital messuage; and the said messuage then became *caput baroniæ suæ*, and derives the title of the messuage and barony to himself by divers descents, and demands judgment if she shall be endowed of it, and avers, that he had assigned to her a third part of his other lands, &c.

The demandant demurs generally.

The court of common pleas gave judgment for the demandant; and now a writ of error is brought in the court of king's bench.

COUNSEL for the plaintiff in error. With submission this is an erroneous judgment. * The reason of the judgment in the common pleas was, that now there is no such thing as *caput baroniæ*; but I hope to prove there are at this day many *capita baroniæ*, and that they are exempted from dower: and this appears in the *First Institute* (a), *Bracton* (b), *Fitzherbert* (c), the *Year Book* (d), *Britton* (e), and *Dugdale* (f). Of the capital messuage the wife shall be endowed, *si non sit caput comitatûs five baroniæ*; and that this privilege is personal appears in the *Institutes* (g), and in *Selden* (h). The ancient way of creation of barons is altered: the king seldom creates a baron, and gives manors, &c. *ad sustentandum nomen et onus*, viz. to give him lands to hold of him in chief, but grants an annuity. It is objected, that where a woman is once entitled to dower the king cannot deprive her of it, yet he may do it obliquely by this means of making a barony: so the king cannot exempt a man from arrests, or being on juries, yet he may create a man a nobleman, and then he shall be exempted from all arrests, and from serving on juries. ANOTHER OBJECTION is, that she shall have an equivalent; but indeed that I take to be absurd, for either she has a right or not; if she has a right, then there needs no equivalent. As for the recompence she has in lieu of this dower, she has the honour of being a countess; and there are many women in England would be contented to lose a great part of their dower to be made countesses.

3. Com. Dig. "Dower" (A. 8.). Co. Lit. 9. b. 16. b. 4. Hen. 4. Fitz. 180. 9. Hen. 7. 1. Bro. "Dower," 102. Cro. Jac. 18.

(a) Co. Lit. 31.

(b) Bract. bk. 2. 93.

(c) Fitz. Abr. "Dower," 80.

(d) 4. Hen. 7. Rot. 7.

(e) Britton, 247.

(f) Dugdale's Summons to Parliament.

(g) Co. Lit. 16. 2. Inst. 9.

(h) Selden's Tit. Hon. 552. 557.

The chief seat or capital mansion-house of a particular family, although it has been in their possession beyond the time of legal memory, is not converted into *caput baroniæ* by the possessor being created a lord; and therefore the wife of a baronet, though created a peer, shall still have dower of such chief seat or capital mansion-house.

* [65]

S. C. 3. Lev.

401.

S. C. 1. Salk.

54. 253.

S. C. Holt, 260.

S. C. 1. Ld.

Ray. 72.

S. C. Ray. Ent.

343.

S. C. Comb. 352.

S. C. Skin. 592.

S. C. 12. Mod.

84.

S. C. Lev. Ent.

76.

Co. Lit. 30. b.

31. b.

Glanv. lib. 6.

cap. 1.

Bract. lib. 2.

fol. 92, 93. 96.

Brit. cap. 101.

103.

Fleta, lib. 5.

cap. 22, 23.

"Dower," 123.

But,

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LADY GERARD
against
LORD GERARD.

But, SECONDLY, I take this judgment to be ill, because of the double amerciamment that is laid on my *Lord Gerard*; and for this I rely on *Specot's Case* (a), that one shall not be twice amerced in one action against one and the same tenant, where the defendant pleads several issues, and are found against him. And prayed that judgment might be reversed.

Skin. 592.

The legal constitution of a barony.

* [66]

9. Hen. 3. ft. 1.
c. 7.
20. Hen. 5. c. 1.

WRIGHT, *Serjeant, à contra.* By these pleadings it is not shewed how this house was made *caput baroniæ*; so that your lordship may judge it to be so. It is shewed, that *Sir Thomas Gerard* was made a baron, but it is not said there was any barony made; and that there may be a baron without a barony appears in *MAGNA CHARTA* (b), where it is said, the heir of a baron shall pay no relief, unless he have a barony. The legal constitution of a barony is, when the king creates certain lands to be a * barony, and they were generally CASTLES fit for the defence of the realm. It is very strange, that because *Sir Thomas Gerard* was made a baron, that therefore his house must be a barony, and that his wife must be deprived of her third part of it, to which she had once a good title. COKE says (c), "the wife shall be endowed of all messuages," and this is one. As for the indecency that the wife might convert her third part to an inn, or introduce inmates, &c. the same may be said of a commoner, but was never any objection. As for the authority of my LORD COKE, in his *First Institute*, it is not his own opinion, but only cited as the opinion of those ancient authors. It is said in the comment on *MAGNA CHARTA*, that the wife shall have her *quarantine* in the chief seat of her husband, *nisi sit castrum*, or *caput baroniæ*; so that they are the same, for their chief seats were frequently castles, and in such case she should not have been endowed; but where she shall have her *quarantine* there she shall be endowed: that is a rule.—As for the double amerciamment, it is true a man shall not be twice amerced for the same thing; but here the demand is of two several things. FIRST, Of the hundred and rents, upon which judgment was presently given. SECONDLY, For the house; and upon this my *Lord Gerard* has specially pleaded, and we have judgment on the demurrer to that special plea. I pray judgment may be affirmed.

Baronies, what?
Vide Lib. Feud.
hb. 2.
Tit. 39.
Seld. Tit. Honour, 880. 883.
Dodds. of Honour,
&c.

HOLT, *Chief Justice.* What is the barony? It is not because it is the chief house. Baronies were anciently out of places. A barony is when the king gives lands or rents to the person he designs to make a baron, and those he is to hold *per baroniam*; and in such case something might be said to exclude a woman from dower; for there were castles also generally granted to do service to the king: but indeed since the time of *Richard the Second*, that barons have been created by *patents*, there have been few baronies made. Then how can this house be made a barony that was always in the family of the *Gerards*? and here it was no castle neither.

(a) 5. Co. 58. (b) *Mag. Char. Cap. 2.* 2. *Inst.* 9. (c) Ch. "Dower."

ROKEBY,

ROKEBY, *Justice*. When a barony was anciently granted, there was a cattle with a territory also granted. Suppose there be a barony of *Stafford*, and all the houses in the town of *Stafford* belonged before to the new baron, which house shall be called *caput baronie* ?

LADY GERARD
against
LORD GERARD.

* [67]

* HOLT, *Chief Justice*. As for the double amerciaments, there may be several amerciaments for several offences. The reason of the amerciaments is the delay, and if the defendant come in at the first day, it must be entered of record or it signifies nothing. Suppose there be an action brought on two deeds, and *non est factum* be pleaded to one, and a special plea to the other, and judgment be given for the plaintiff in both cases, why certainly here shall be several fines if they enter several judgments. It is true, if they enter but one judgment, there shall be but one *capiatur* (a). So it is of actions of assault and battery against two, where the one justifies, and the other confesses the action.

In dower, if judgment be given against the tenant on confession and on demurrer, a *misericordia* may be entered on each of the judgments.

8. Co. 61.
5. Co. 57.
Comb. 352.
2. Leon. 185.
1. Roll. Abr.

The judgment was affirmed.

218. 1. Salk. 54. Skin. 593. 2. Saund. 296. 4. Com. Dig. 8vo. 708. 2. Bac. Abr. 512, 513.

(a) See 16. & 17. Car. 2. c. 8. f. 1. & 4. and 4. Ann. c. 16. f. 2.

Winehurst against Masely.

Case 25.

MR. CARTHEW moved for leave to quash his own writ of error to reverse a fine, because one of the parties to the fine was omitted in the writ of error.

A writ of error to reverse a fine, in which one of the parties to the fine is omitted, is erroneous; but the Court will not let the plaintiff in error quash his writ without a rule to shew cause, and then on payment of costs.

HOLT, *Chief Justice*. We cannot do it. How can we take notice of any thing but what is on record? We cannot quash it on a foreign suggestion. There was a case in PEMBERTON'S time, where a fine was levied by three, and two of them brought error to reverse it, perhaps the other had nothing in the land, and it was reversed.

But this is to be considered, that if a man be intitled to be tenant by the courtesy, and he joins in a fine with his wife of those lands; whether his title to be tenant by the courtesy is not extinguished if the fine be reversed after her death. Indeed, if the fine be reversed in her life-time, he may have a new title: if the husband make a feoffment on condition of his wife's land, and she dies, and then the condition is broken, shall he be tenant by the courtesy?

THEN you cannot have any costs if the party enter a *non prof.*; for the statute 3. Hen. 7. c. 10. gives costs on a writ of error only when it is in *dilation executionis* (a).

S. C. Holt, 271.
1. Salk. 49. 88.
194.
8. Mod. 316.
5. Com. Dig. 8vo. 714.
3. Com. Dig. 251.
Stra. 139.

(a) But now by 4. & 5. Ann. c. 16. f. 25. in order to prevent the great vexation of suing out defective writs of error, it is enacted, "that upon quashing any writ of error for variance from the original record, or other defect, the defendants in such error shall recover, against the plaintiff issuing out such writ, his costs as he should have had if the judgment had been affirmed, and to be recovered in the same manner."

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WINCHESTER
gainst
MASELY.

We cannot let you *quash* it: but let them shew cause why you should not *discontinue* (a). Writs of error are rarely discontinued, but sometimes they may be.

(a) By 8. & 9. Will. 3. c. 11. f. 2. " writ of error discontinued, or the plain-
" If judgment shall be given for the " tiff become nonsuit therein, the de-
" defendant in any action, and the " fendant in error shall have judgment
" plaintiff shall sue a writ of error, and " to recover his costs." See 3. Com.
" the judgment shall be affirmed, or the Dig. " Costs" (B.).

* [68]

Cafe 26.

* Dashwood's Cafe.

" Error pend-
" ing" pleaded
in abatement to
debt on judg-
ment.

PER CURIAM. In debt on a judgment obtained in the court of king's bench, " a writ of error pending" in the exchequer chamber, is a good plea in *abatement* (a); but if the defendant conclude, "*non debet respondere quousque*," it is not good, for we have no *re-summions*.

1. Sid. 236.
253. Pal. 187. 307. Ray. 100. 1. Lev. 153. 2. Mod. 194. Comb. 48. 199. 211. 219. 229.
332. 455. Skin. 388. 590. Carth. 200.

(a) But see Syms v. Tyms, 1. Show. 98. and Rottenhoffer v. Lenthall, 1. Show. 141. that in this case " a writ of error depending" cannot be pleaded in abatement; but the Court will, according to the circumstances of the case, stay the proceedings in the action on the judgment until the writ of error be de-
terminated. Fawell v. Storce, 4. Burr. 2454. ; Greble v. Abbot, Cowp. 72. ; Entwist v. Shepherd, 2. Term Rep. 78. ; Christie v. Richardson, 3. Term Rep. 78. ; Pool v. Charnock, 3. Term Rep. 79. ; Evans v. Gilbert, 4. Term Rep. 436.—And see the case of Dighton v. Granville, 4. Mod. 248.

Cafe 27.

Lewsly against Budd.

If a statute direct the streets within the bills of mortality to be paved at the expence of all the inhabitants, not only those inhabitants who live in the streets which are paved, but those whose houses stand on the adjoining roads, not paved but within the parish, shall equally contribute to such expence.

HOLT, Chief Justice. This case stands for the resolution of the Court.

It is on two orders grounded on the statute 2. Will. & Mary, c. 8. f. 8. and 9. for scavengers rates for cleansing the streets of Newington. One order states that all the inhabitants shall contribute to it; the other states, that only those that live on the pavement shall contribute: and the question is, Which of them is good?

We are of opinion, that all the inhabitants shall contribute; for though it may be thought hard that they shall pay any thing towards the pavement who do not live on it, yet the words of the statute are so strong that it lays the charge on all the inhabitants without distinction; and where the statute does not distinguish, we have no power to do it. Now in Newington there is a street that is paved and a great part of the town that is not, and there are several of the parish that live out of the town, and yet they are all bound to contribute. Besides, they that live on the pavement are bound to pave

S. C. 1. Salk. 356. S. C. Skin. 643. S. C. Holt, 506. 2. Saund. 423. 2. Inst. 657. 702.
2. Rol. 289. Cro. Eliz. 659. 843. 1. Bullst. 20. 2. Rol. Rep. 262. 5. Co. 67. 1. Mod. 73.
1. Leon. 208. 1. Sid. 218. Post. 393.

their

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their own doors: Then they are not exempted from repairing the highways; and therefore it is as reasonable they should repair *the pavement* of which they have the benefit; and an indefinite proposition is equal to a general one: Then the statute appoints, "that they who do not live on *the pavement*, as well as they who do, "shall settle the rates;" and therefore it is reasonable that they should contribute to their own rates. Then the penalty of *the scavenger* is given to the overseers generally. How this would be on the statute 13. & 14. Car. 2. c. 12. we cannot tell; but on this statute *all the inhabitants* ought to contribute towards the cleansing of *the pavement*: And therefore one of the orders is good, and the other is bad, and ought to be quashed.

Lewellyn
against
Budd.

* [69]

* Walker against Slackoe.

Case 28.

IN A WRIT OF ERROR all the parties to the first judgment did not join.

A writ of error in which some of the parties to the first judgment are omitted, is bad, and not amendable, although the omission be the fault of THE CURSITOR.

HOLT, Chief Justice. The question is, Whether this writ of error be amendable? It appears here, that the writ of error is not good, for all the parties to the first judgment ought to join in error, and it appears they have not done so here; for it not being said that he who is omitted is dead, the writ of error is ill. But supposing that this is only a mistake of THE CURSITOR, the question is, Whether it be amendable? And we are of opinion that it is not, because this is a writ to reverse a judgment; and the statutes were only made to amend writs for the support of the judgment; and so is the statute 8. Hen. 6. c. 12.

S. C. ante, 16.
S. C. Comb. 354.
S. C. Carth.

367. Vide 1. Sid. 104. 138, 139. 193. 1. Lev. 99. 3. Co. 2. 1. Mod. 153.

But if this fault were amendable, yet we think it must not be at the motion of the defendant; for no man can pray to amend another's plea or writ: he may take advantage of it, but cannot pray to have it amended; for every man may sue or plead as he thinks fit, but this would force him to sue in another manner; and it is not within any of the statutes.

A defective writ of error cannot be amended on the motion of the defendant in error.

S. C. Holt, 54. S. C. 1. Ld. Ray. 71.

The second point is grounded on the reason in *Blackmore's Case (a)*. They have power of amendment in affirmance of judgments. And in no case whatever did the Court amend to set aside a judgment, but only to support it; and that was the design of all the statutes.

Amendments, when they tend to invalidate judgments, shall not be allowed.

BY THE COURT. Let the writ of error be quashed (b).

6. Mod. 176.
285.

(a) 8. Co. 158. b.

(b) See 5. Geo. 1. c. 13. Ante, 17. notes.

Case 29.

Chamberlaine against Hewson.

If a wife obtain costs in the spiritual court in a suit against a woman for adultery with her husband, the husband may release them; but if the wife proceed in the spiritual court, and the adulteress plead the release, a prohibition shall go, except it appear that the wife, previous to the instituting of her suit against the adulteress, was separated à mensâ et thoro from her husband, and allowed alimony.

S. C. 1. Salk.

115.

S. C. 12. Mod.

89.

S. C. Holt, 99.

S. C. 1. Ld.

Ray. 73.

1. Roll. Rep.

426.

Quere, 2. Lev.

161.

1. Sid. 346.

2. Stra. 1167.

2. Com. Dig.

"Baron and

"Feme," (O).

1. Bac. Abr.

211. 290.

3. Bac. Abr.

485.

4. Bac. Abr.

262.

Hullock on

Costs, 399.

Plowd. 13.

2. Roll. Abr.

296.

2. Salk. 551.

1. Vent. 220.

246. Cro. Jac.

THE CASE here was thus: *Mrs. Hewson*, the wife of *Colonel Hewson*, sued the plaintiff *Mrs. Chamberlaine* in the spiritual court for adultery with her husband, and had sentence there, and recovered eighty pounds costs against her. Then *Mrs. Chamberlaine* procures a release of *Colonel Hewson* under hand and seal; notwithstanding which the wife prosecuted her in the court christian for the costs. Upon which it was moved here for a prohibition, suggesting, that the ecclesiastical court had no consuance of this deed of release.

* *WRIGHT, Serjeant*, argued, that no prohibition ought to go to the spiritual court, for that they had consuance of all this matter; and that it was a rule in law, *Ubi cognitio principalis, ibi cognitio accessarii*; so that it is not material whether the release be good or not: but the point is, Whether this Court will think fit to meddle with it, since the original cause is cognizable by the spiritual court? There is a case (a) where a release was likewise pleaded in the spiritual court, as it is here, and a prohibition was denied; and if in such cases the husband's release should be good to bar the wife of her costs, all suits of this nature would be eluded; for it is the costs that are reckoned the most grievous punishment in this court. There are but two sorts of punishment there, *penance* and *costs*; and the penance too may be dispensed with for money.

SIR B. SHOWER à contra. We hope that a prohibition shall go, since the ecclesiastical court has refused to allow this release, which, with submission, they ought not to do; for the costs, as soon as they are paid to the wife, belong to the husband; and therefore he may release them before they are paid. So the rule put by *MR. SERJEANT* is fallacious; for in many cases they cannot proceed in the spiritual court, though the original cause be within their jurisdiction. So is *Goodwin's Case* (b): An executor enters into a bond to pay a legacy; he is sued in the spiritual court as for a legacy; the executor pleads payment according to the bond; they would not allow the plea; and a prohibition was granted; for the executor by giving bond for payment of the legacy had extinguished the legacy, and made it merely a debt at common law. A wife divorced *causa adulterii* of the husband sues in the spiritual court for a legacy (c); the defendant pleads the release of the husband made after the divorce, which was disallowed in the spiritual court; and a prohibition was granted; for this release was good, for they remained man and wife notwithstanding the divorce (d). Therefore we pray that the prohibition may stand.

HOLT, Chief Justice. After that rate they shall try the validity of letters patents and of feoffments, &c. if they have consuance

(a) Roll. Abr. "Prohibition," 300.

(b) Yelv. 39.

(c) Stephens v. Totty, Cro. Eliz. 908.

(d) 2. Roll. Abr. 292. 301.

of the original. Indeed, if they make an ill construction of the law, we prohibit them; so if they will not allow a release unless proved by two witnesses, we would prohibit * them; as in the case of *Shotter v. Friend* (a). The spiritual court are confined within their compass, and if they go beyond their line, we will fetch them back by a prohibition; for under that notion of *ubi cognitio principalis, ibi cognitio accessarii*, they may do as they please, and so subvert and destroy the common law. Indeed, if the suggestion had been that they refused to receive this plea, it might be something.

ROKEBY, *Justice*. SIR BARTHOLOMEW SHOWER, your client does not deserve any favour; but she must have justice. *Vide 2. Lev. 161.*

At another day, this matter being again stirred,

HOLT, *Chief Justice*. If a *feme covert* sue sole in the ecclesiastical court for defamation, as she may if she cohabit with her husband, he may release the costs; but if they are divorced *à mensâ et thoro*, there in such case, or of incontinency, &c. he cannot release the costs; and the reason is, that if they are divorced *à mensâ et thoro*, the husband allows his wife *alimony*, and the costs of the suit are out of the *alimony*; and therefore he cannot discharge one more than the other. *Motteram's Case* is the very same (b); and the same is in *Bulstrode* (c): *Baron and feme divorced causâ adulterii à mensâ et thoro*; the *feme* sues in the ecclesiastical court sole against one for slander; sentence is for her; the husband releases all actions, and this very suit, &c.; the defendant pleads this release in the ecclesiastical court, which was disallowed, yet no prohibition was granted: in case of a legacy *aliter*, yet if the suit be there for a legacy devised to the wife, which is originally due to the *baron and feme*, and is not a part of the *alimony*, he may release the suit and also the costs, because he may discharge the principal. My opinion is, that there should be a prohibition in this case. But here you say *alimony* is sentenced to *Hewson's* wife; prove that, and then it is in our discretion not to grant a prohibition; as if it be suggested, that the party is cited out of the diocese, we prohibit them; but, on proof that it is upon request to the archbishop, as is the exception in the statute 23. *Hen. 8. c. 9.* we can stop the prohibition.

(a) 3. Mod. 283. 1. Show. 158. (b) *Motteram v. Motteram*, 2. Roll, 172. Comb. 160. 2. Salk. 547. 301. S. C. 1. Roll. Rep. 426. Carth. 142.

(c) 3. Bulstrode, 264.

Pullen against Palmer.

Trinity Term, 6. Will. & Mary. Roll 179.

CARTHEW. This is on *replevin*, in which the defendant *avows* in his own right; and it appears that B. assigned a rent to thirteen, four of whom are dead, and the defendant * is one of the A. distrain for rent arrear, and aver the taking solely in his own right, the action, on demurrer, shall abate; for although a jointenant may *distrain* alone, he cannot *avow* for the whole, as in his own right, but ought to make consue for the rest: *Sed quere*, If in such case the Court will not grant a *repleader*.—S. C. Post. 150. S. C. 3. Salk. 207. S. C. Carth. 328. 2. Lut. 1211. Aste, 25. Post. 73. 141. 2. Lev. 228. 1. Salk. 444. Thomp. Ent. 264. 3. Bac. Abr. 216.

CHAMBER-
LAINE
agast
HEWSON.

8. Mod. 63.

Vide 2. Lev. 161.
1. Sid. 346.
1. Salk. 115.
&c.

1. Salk. 115.

Comb. 105.
448.
Carth. 33.

* [72]
Case 30.

PULLEN
against
PALMER.

nine survivors, and avows the taking the distress in his own right because the rent is arrear, which he cannot do; but it ought to be in his own right and as bailiff to the rest, and they ought not to have severed.

NORTHEY. This is but form. If we had avowed for a ninth part, it had been ill in substance, because there is no such thing as a ninth part; but on this special matter shewn in the avowry, it is but form, and one *joint-tenant* by law may take the whole profits of all the rest, and his discharge of it is good (a). Payment of rent to one *joint-tenant* is good. A rent-charge was granted to a *feme sole* which was arrear, and she married; and the avowry supposed twenty pounds to be in arrear, not paid to *baron* and *feme*, and it was held good.

CARTHEW. One *joint-tenant* cannot distrain for all the rent alone, for they must all join in avowry, and so must *tenants in common* even for *damage-feasant*.

ROKEBY, *Justice*. It seems to be but form, for one *joint-tenant* may take all the profits.

HOLT, *Chief Justice*. If all ought to join, then it is not form but substance; for it shews, that the rent is not taken in the same right it was arrear. But the question is, Whether they needs must join? All the entries are, that they do join not as bailiff to the rest, but as *joint-tenants*; and he avows the taking of the rent as in lands liable to the distress of him and the rest. If he had said, "to his distress only," it had been bad; because the rent is not due to him only, but to him and the rest: but he need not avow as bailiff to them, for he needs no authority from the rest to distrain, but he may do it by law; and so the defendant has avowed here as in lands liable to the distress of himself and the rest.—One *joint-tenant* may distrain for the whole in point of interest, and not have any authority from the rest as bailiff, for then he is to render an account.

* [73]

In replevin, if the avowant state a rent granted to "him and his heirs," and that he was seized thereof, it shall be intended a *seisin in fee*.

CARTHEW. Then it is not said through the whole record, that they were *seised in fee*; but it is only, generally, that they were seized.

HOLT, *Chief Justice*. They should have said so; for though by intendment, "*seised*" may be taken to be "*in fee*," yet they ought to shew it: but, however, this here is well enough; for you say the rent * was granted to them and their heirs, and that they were *seised* of it, which must be understood *in fee*.

Carth. 9. 10. Co. 34. Lut 1316.

CARTHEW. Then they say the *locus in quo* is parcel of the tenements hereafter mentioned, which he shews to be in several parishes, and does not shew in which parish the *locus* is.

HOLT, *Chief Justice*. That is not so well as it ought to be.

At another day,

CARTHEW. As to the case of *Wife v. Bellant* (b), which was in replevin, the defendant avows, because his ancestor was seized in fee, and let the land *in qua*, &c. for years rendering rent; and for rent due to him and his wife, he avows the taking; and on verdict for the avowant, an exception was taken in arrest of

(a) See Bowles v. Poor, Cro. Jac. 282. 2. Co. 63.

(b) Cro. Eliz. 443. judg.

Michaelmas Term, 7. Will. 3. In B. R.

judgment, because the *baron* sole avowed, and did not join the wife with him; whereas it appears, that the rent was due to him and his wife, and he ought not to avow in his own name only; but because he shewed the truth of the matter as it is, and did aver the life of the wife, and so the distress well taken by him, the avowry was adjudged good enough: That was, because the rent belonged to him; but if it had not been in the case of *joint-tenants*, it had not been good.

PULLEN
against
PALMER.

HOLT, *Chief Justice*. Suppose one joint-tenant should bring debt for rent, and it appeared that the other was alive, it would be bad. He may distrain alone, but then he must avow in his own right, and as bailiff to the other; and then the return must be adjudged to him in his own right, and as bailiff to the other, in which case he is accountable to the other: but if we give judgment for him in this avowry, we must adjudge the return of the whole to him in his own right; and though payment to one joint-tenant is so to the other, yet we must not give judgment for him alone, to have it all in his own right.

Ante, 25. 71.
4. Bac. Abr.
390.

I think the avowry ought to *abate*; but this being upon a *demurrer*, the question is, Whether we shall give judgment that the whole avowry shall abate, and to begin *de novo*; or only that it shall abate, and there be a *repleader*?

Post. 77, 78.

PER CURIAM. The avowry is naught.

* [74]

* Reynolds against Osborn.

" Case 31.

COUNSEL moved for costs on a verdict in trespass, for breaking his close, and breaking his soil, and one shilling damage given; for he said it was not within the statute of 22. & 23. Car. 2. c. 9. which does not extend to voluntary, but involuntary trespasses only; as walking over the ground.

In trespass for " breaking his close and breaking his soil," the plaintiff shall have no more costs than damages, unless the Judge certify pursuant to the 22. & 23. Car. 2. c. 9. that the freehold or title was chiefly in question.

E CONTRA. There have been attempts to turn *trespass* into *case*, to get costs; but no costs shall be given in this case more than damages, unless the Judge who tries it certifies that the title was in debate. I agree that if the defendant take away any thing, he shall pay costs; but here was only a little digging; if he had carried away the soil, then indeed the plaintiff should have costs.

S. C. Carth.

ROKEBY, *Justice*. I remember a case in the court of common pleas, where it was laid *quod solum subvertit cum aratro*, and costs were allowed; and what difference is there in that from this?

224.
Post. 315.
2. Vent. 48.
2. Lev. 124.
Comb. 324.
399. 420.
Carth. 224.
11. Mod. 198.
Bull. N. P. 329.

HOLT, *Chief Justice*. Ploughing a man's soil is quite another thing. The statute extends to trespass on the freehold, and not to any trespass on goods and chattels: it will be a hard matter for you to get costs here. In the case of *per quod servitium amisit*, the costs are not there given for the battery, but for the degree of it, *viz.* the loss of the service (a).

ADJORNATUR.

1. Stra. 577. 2. Ld. Ray. 1444. Salk. 193. 3. Burr. 1282. 2. Black. 1151. Hullock on Costs, 66. 3. Com. Dig. "Costs" (A. 3.).

(a) 1. Salk. 208.—And see also Rep. 854. 2. Ld. Ray. 831. 1. Bac. Batchelor v. Bigg, 3. Will. 319. 2. Bl. Abr. 515. 3. Bac. Abr. 507.

Cafe 32.

The King against Davis and Carter.

The affidavit of persons attainted of forgery, either at common law or on 5 Eliz. c. 14 cannot be read in evidence.

* [75]

S. C. Holt, 501. 754.
S. C. Salk. 461.
Ante, 15.
Co. Lit. 6.
3. Lev. 426.
2. Salk. 514.
689.
1. Vent. 349.
1. Sid. 51.
2. Hal. 277.
2. Hawk. P. C. ch. 46. f. 19.
2. Stra. 1148.
2. Willf. 215.
Tidd's Practice, 39.
Gilb. L. E. 140.

DAVIS and Carter being convicted for forging a bill under the seal of THE BANK OF ENGLAND, and having stood in the pillory for it (a), were now brought up to the king's bench, and prayed that they might be turned over to THE MARSHALSEA, because the sheriff of London oppressed them in NEWGATE, where they were detained till they paid the fine, &c. and their own affidavits were offered to prove the oppression.

HOLT, Chief Justice. If a man has had an infamous judgment, and has stood on the pillory for an offence which is contrary to the faith, credit, and trust of mankind, as forgery is, he cannot be a witness in any cause (b). HALE says, if he has stood on the pillory, he cannot be a witness (c); but that is to be understood for an infamous judgment (d). But if a man be convicted for a libel, and has stood in the pillory for it, yet perhaps he may be a witness (e).

SHOWER. Canning, who was convicted for a libel and stood on the pillory, was allowed to be a witness before the delegates, TREBY, Chief Justice, and other Judges being there: and so Aaron Smith was an evidence in Crosby's Case (f).

HOLT, Chief Justice. Aaron Smith was pardoned, and we gave no opinion to this point: but for my part, I do not understand the nature of his offence; it was only for giving Stephen College notes how to defend himself on his trial.

IN the principal case, the affidavits were not read (g): but the last day of the Term, THE COURT ordered the sheriffs to return the money which they had taken from them; and remanded them to NEWGATE.

(a) But this is now made a capital offence by 8. & 9. Will. 3. c. 20. f. 36.; by 2. Geo. 2. c. 25. and 31. Geo. 2. c. 22. f. 78.; and see the 33. Geo. 3. c. 30.

(b) Co. Lit. 6. b. See 2. Salk. 461. 513. 689.

(c) 1. Hale P. C. 301. 2. Hale P. C. 280.

(d) See the case of Pendock v. Mackender, 2. Willf. 18.

(e) Gilb. Law Evid. 139.

(f) Ante, 15.

(g) An affidavit to obtain a rule for an attachment made by one convicted of forgery has been refused to be read, Walker v. Kearney; but it is there said, that the affidavit of one Charlesworth, who had been convicted of forgery, was read to defend himself against a complaint, 2. Stra. 1148.; and therefore the affidavit of one convicted of perjury has been allowed on a rule to set aside a judgment against him for irregularity, Carter's Case, 2. Salk. 461. It is clear, how-

ever, that the testimony of a person attainted of any of those offences which come under the denomination of the crimen falsi, cannot be received to support a charge against another, Co. Lit. 6. Salk. 690. 2. Hale, 277. 2. Roll. 684. Gilbert L. E. 139. 2. Hawk. P. C. c. 46. f. 19. Cases in Crown Law, 2d edit. 349. 4. Term Rep. 440. For it is now settled, that it is the infamy of the crime, and not the nature or the mode of punishment, which destroys the testimony of the offender, Pendock v. Mackender, 2. Willf. 18. Therefore a person convicted of petty larceny, and whipped, was held an incompetent witness to a will, 2. Willf. 19. But as the transportation inflicted on this offence by 4. Geo. 1. c. 11. and 6. Geo. 1. c. 23. did not, as in grand larceny, operate as a statute pardon, it is enacted by 31. Geo. 3. c. 35. "that no person shall be an incompetent witness by reason of a conviction of petty larceny."

Lewis

Lewis against Masters.

Cafe 33.

J. S. dies intestate in London, and Godspit his creditor attaches money in the garnishee's hand, and it is condemned before any administration actually granted, it being at that time contested before THE ARCHBISHOP.

SIR B. SHOWER. I take this manner of proceeding to be good by the custom of London. It is true their customs are different from the laws of the land, and yet are good, for they are confirmed by acts of parliament; so general *indebitatus assumpsits* are good by the custom of London, &c.

The creditor of an intestate cannot, by the custom of London, attach money in the hands of a debtor to the intestate before letters of administration granted.

* [76]

HOLT, Chief Justice. It is one thing if a custom be different from the law, and another thing if it be repugnant to it and unreasonable. I confess, the custom of *garnishment* is reasonable, for there are two debts discharged by it: For if *A.* be indebted to *B.* and *C.* be indebted to *A.* now *C.* standing against *B.* in lieu of *A.* by the payment of that debt by *C.* to *B.* both the debts to *A.* and *B.* are discharged and satisfied. Now in this case, *A.* has at the same time a remedy to recover against *C.* which by the custom is transferred to *B.*; but in our case, the creditor *Godspit* would have remedy against *Masters* the garnishee *, when the Archbishop had none, and would discharge the garnishee against the Archbishop, who had never any claim against him; which certainly is absurd, and wholly differs from the other case; for there *A.* had a charge against *C.* and by his payment to *B.* *C.* is discharged from *A.* But there can be no custom to support this case; for customs that overthrow the principles of law, and which are unreasonable, are to be rejected.

S. C. Post. 92.
S. C. Carth. 344.
S. C. 1. Ld.
Ray. 56.
S. C. Skin. 516.
S. C. 3. Salk.
49.
S. C. Holt, 325.
429.
S. C. Comb. 347.
Post. 160. 440.
1. Roll. Abr.
105. 551.
Dyer, 196.
Cro. Eliz. 593.
Comb. 109. 347.
427.
3. Will. 297.
2. Bl. Rep. 834.
1. Bac. Abr.

DEE. Here the ordinary had the goods in his hands, and had intermeddled; and why should he not be charged? The customs of London are in many cases different from the common law; so an executor is chargeable there, upon an action of debt grounded on simple contract; and the judgment in such an action has been allowed to be a good bar here.

691.
4. Term Rep. 312.

HOLT, Chief Justice. So it is, as was adjudged here in the case of *Palmer v. Lawson* twelve years ago. But here was a trick too, to put in a caveat to the granting of administration till the plaint was finished.

ROKEBY, Justice. Can you charge any one by this custom that is not a debtor? and here the Archbishop is no debtor.

HOLT, Chief Justice, at another day. We think in this case, that the debt was not well attached; for the ordinary had no way to recover the debt, nor had any thing to do with it.

LET the plaintiff have judgment.

Case 34.

Gardner against Hobbs.

In *trespass*, if the defendant justify the taking for poors rate, and the plaintiff is nonsuited, and the jury do not assess damages, a writ of enquiry shall issue: so in *detinue* and in *replevin*.

THIS was an action of trespass, and the defendant justified by virtue of the 43. *Eliz.* c. 2. for the poors rates, &c. The plaintiff was nonsuited, but no damages were found; therefore Counsel moved for a writ of enquiry.

HOLT, *Chief Justice*. I remember a case, where, upon an action of *detinue*, and upon issue *non detinet*, the jury did not enquire of the value, and afterwards we granted a writ of enquiry. It is every day's practice, that if the plaintiff in *replevin* be nonsuited (a), the jury shall find damages and costs for the avowant (b),

S. C. Holt, 192. Post. 77. 118. 2. Roll. Abr. 722. 11. Co. 6. 10. Co. 119. 3. Leon. 213. Lurw. 211. 1. Salk. 206. Skin. 595. 12. Mod. 85. 5. Com. Dig. "Pleader" (3. K. 30.). 2. Bat. Abr. 13. Sayer Rep. 214. Hullock on Costs, 233.

(a) See the case of Freeman v. Lady Archer, 2. Bl. Rep. 763. ; and Dewell v. Marshall, 2. Bl. Rep. 921. 3. Will. 442.

(b) See the case of Valentine v. Fawcett, Stra. 1021.

* [77]

Case 35.

* Harcourt against Weeks.

The omission of the jury to enquire of damages on a nonsuit in *replevin* may be supplied by a writ of enquiry.

THIS was a case of the same nature with the former.

HOLT, *Chief Justice*. We are of opinion, that the omission of the jury to enquire of the damages on a nonsuit in *replevin*, may be supplied by a writ of enquiry of damages: it is true, the jury might have been charged with the damages, but since they were not, there may be a writ of enquiry awarded. In *assumpsit* (a), the parties being at issue, a demurrer was joined upon the evidence, and so the jury was discharged; and after judgment was given for the plaintiff, and a writ of enquiry awarded, and damages found, and judgment thereupon: and damages might have been enquired of by the same jury conditionally, but it may be as well enquired of by a writ of enquiry, when the demurrer is determined: and that comes home to this. *Brampton's Case* (b) is the same with ours; so that it is no new case. Indeed, in the case of *Burton v. Robinson* (c), where in *detinue* the jury omitted to assess the value of the goods, the Court did doubt that a writ could not be awarded, for that it would be against the whole tenor and reason of *Cheney's Case* (d). But, notwithstanding, I remember a case about fourteen years ago, where a writ was awarded in such case; so that I think a writ of enquiry ought to be awarded in this case.

S. C. Holt, 192. Post. 118. 1. Roll. Rep. 722. 284. 2. Roll. 212. Cro. Car. 357. 446. Hard. 166. 1. Sid. 380. 1. Vent. 40. Raym. 170. 124. 1. Lev. 255. 1. Salk. 205. 3. Com. Dig. "Pleader" (3. K. 30.).

(a) Darroze v. Newbut, Cro. Car. 143. (b) 1. Roll. Rep. 272.

(c) 1. Sid. 246. Raym. 124. (d) 10. Co. 119.

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Johnson *against* Adams and Others.

Cafe 36.

IN replevin, for taking live cattle, and several stacks of hay, &c. the defendants plead, "*bene cognoscunt captionem averiorum et catallorum in loco præd. quia dicunt quod averia præd. &c.*" but say nothing as to the chattels; but they conclude, and pray judgment *averiorum et catallorum*.

CURIA. It is ill: for though they make cognizance of the whole, yet they do not answer the whole; so that they are short in their justification. If the distress be intire, and it is wrong in part, it is bad for the whole.

* The matter is, what judgment we shall give; Whether to abate the avowry, or that the plaintiff shall recover and have judgment final? Certainly it is ill to acknowledge the taking of all, and to justify but for part.

We will consider what judgment to give.

In replevin for bona, catalla, et averia, a CONNUANCE of all, and JUSTIFICATION for part, is bad.

* [78]

S. C. Comb. 346.
S. C. 12. Mod. 84.
S. C. Holt, 555.
Ante, 73.
3. Co. 26.
5. Co. 19.
Carth. 346.
4. Mod. 402.
1. Saund. 287.

Cudmore *against* Tripe.

Cafe 37.

WRIT OF ERROR on a judgment given in the provost-court at Exeter, where the plaintiff declared in an *indebitatus assumpsit*, and also in a *quantum meruit*; but in the *quantum meruit* does not say, that the cause of action was *infra jurisdictionem curiæ*.

CARTHEW. If it had been omitted in the first promise, I confess it had been ill; but I conceive, the *infra jurisdictionem* in the *indebitatus assumpsit* goes to all.

HOLT, Chief Justice. Indeed; there wants the *ad tunc et ibidem*.

Let JUDGMENT be reversed (a).

413. 2. Show. 246. Salk. 404. 6. Mod. 223. 1. Saund. 73.

(a) In an inferior court the declaration must in every count not only alledge that the money was *bad and received* within the jurisdiction; but that the defendant *promised to pay* within it, *Tievor v. Wall*, 1. Term Rep. 151.; or the defendant may take advantage of

ASSUMPSIT in an inferior court omitting to alledge that the work was done or the goods delivered *within the jurisdiction* is erroneous.

S. C. Comb. 347.
S. C. Holt, 554.
S. C. 2. Show. 2. Wilf. 16.

such defect on a writ of error or false judgment, *Rowland v. Veale*, Cowp. 20.; but if the cause of action do not arise within the jurisdiction, the defendant must avail himself of it by plea in the court below. Cowp. 20.

The Cafe of Kendal and Others.

Cafe 38.

THE defendants being brought up by *habeas corpus*, it appeared by the return that they had been committed by Sir William Trumball, one of the *secretaries of state*, for assisting Sir James Montgomery, who was in custody for *high treason*, in his escape. The peace, by virtue of his office may commit a person for assisting another in the custody of a *mis-senger* for *high treason* to escape; but if the particular species of treason for which the prisoner was in custody be not clearly and certainly expressed in the WARRANT, the court of king's bench will admit the party to bail.—S. C. 1. Salk. 347. S. C. Comb. 343. S. C. Holt, 144. S. C. 12. Mod. 82. S. C. Skin. 536. S. C. 1. Ld. Ray. 65. S. C. 4. St. Tr. 854. 1. Leon. 175. 1. And. 297. 4. Com. Dig. 8vo. 333. 5. Com. Dig. 8vo. 140. 1. Bac. Abr. 224. 378. 2. Hawk. P. C. ch. 15. f. 66. ch. 16. f. 4. 2. Wilf. 205. 244. 275. 283. 3. Burr. 1742.

A *secretary of state*, although he is neither a conservator nor a justice of the

SIR

Michaelmas Term, 7. Will. 3. In B. R.

THE CASE OF
KENDAL
AND OTHERS.

SIR B. SHOWER moved, that they might be discharged, their commitment not being legal.

* [79]

FIRST, Because a *secretary of state* is no justice of peace; and as a *secretary of state*, he cannot take a recognizance to prosecute; and therefore it is strange he should have power to commit. It is true, since *Sir Lionel Jenkins's* time, it has been practised by the secretaries of state to take bond. I have looked into *Rushworth's Collections*, and I cannot find one precedent for a secretary of state to commit any one. It cannot be presumed, that *Sir William Trumball* was a justice of peace; for it appears that he was secretary of state, and as such did make the commitment; and truly, I cannot * see but he might as well commit for *murder* or *felony* as for *high treason*. It is objected, that any man may arrest another for treason, and that is true; but then he must carry him to a *justice of the peace*, which we say the *secretary of state* is not.

Gaoler not to be
arraigned for an
escape till the
prisoner be at-
taint.

Dalt. 331.
c. 159.
Hawk. P. C.
c. 19. f. 26.

SECONDLY, But however, though we were to grant that a *secretary of state* has power to commit, yet, with submission, in this case the defendants ought to be bailed, since they are within the benefit of the *habeas corpus act*; for the commitment appears to be for the assisting the escape of *Sir James Montgomery*, who was committed for *high treason*, but was never outlawed nor indicted. And my LORD CHIEF JUSTICE HALE (a) is express, that the gaoler shall not be arraigned for an escape until the prisoner be attainted; for if the prisoner be acquitted, the escape is dispunishable. And here the prisoner cannot be attainted, for he is dead; so that they only can be fined and imprisoned,

2. Inst. 589.
591.
3. Hale, 234-
590.

THIRDLY, With submission, to assist in the escape of one committed for *high treason*, is not treason, unless the party assisting knew that he was committed for high treason (b): and if this offence be but felony, the commitment is illegal, because it would have been too generally set forth (c). If a prisoner broke prison, it was felony at common law, be the cause what it might; but by statute 1. Edw. 2. *De frangentibus prisonam*, "none shall suffer judgment of life and member, unless the cause" for which he is imprisoned require such judgment (d):" and I take it for a rule, that whatever is not felony on the escape of a felon, is not treason upon the escape of a traitor (e).

See 1. Burr. 460.

FOURTHLY, It is said, that the prisoner was in custody of a MESSENGER; but what that is we know not; there is no book of law that takes notice of any such person.

FIFTHLY, It does not appear what the offence was, nor that any treason was committed.

So that we must throw ourselves upon your Lordship's justice, and hope that for these reasons your Lordship will think fit to discharge us quite, or else to bail us.

(a) Hale P. C. 110.

(b) Benstead's Case, Cro. Car. 583.

(c) 2. Inst. 589. 3. Inst. 70.

(d) 2. Hawk. P. C. ch. 18.

(e) Staund. P. C. 31. Hale's P. C.

108. 2. Bac. Abr. 638.

TREVOR,

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TREVOR, *Attorney General*, answered, that these commitments by *secretaries of state* had always been received to be good, and that their office was more ancient than the *privy council*, and that it was clear the *privy council* could commit; and that though the warrant be not so exact, yet it is sufficient; and it was not like an *indictment*, for the time and place, and the * particular fact need not be expressed in the warrant, as they must be in indictments.

Commitment
by SECRETARY
OF STATE.

* [80]

SHOWER. Here the messenger being no officer in law, the party in his custody may bring *false imprisonment* against him; and then to assist a person to escape in such a case, is no fault at all, for it was to free him from one that had nothing to do with him.

HOLT, *Chief Justice*. The law indeed does not take notice of A MESSENGER; but however, if a man rescue another that is carrying to the gaol by a MESSENGER, or any other person, it is criminal. — Then why should not a *secretary of state* have power by law to make commitments? Pray what authority has a *justice of peace* to commit in cases of *high treason*? It is not given to him by any statute; and truly I cannot tell from whence he derives such an authority, unless it be by virtue of the old common law, which does authorize *conservators of the peace* to commit in such cases. My LORD COKE seems to intimate, as if a man could not be committed till he was *indicted*; but certainly that is a mistake; for the constant practice is otherwise (a). But their strongest objection seems to be, that the nature of the treason is not set forth; as whether it be for levying of war, or for conspiring of treason, or any other species of treason.

How the law
takes notice of
A MESSENGER.

1. Hale, 598.
606.
2. Hawk. P. C.
c. 21. s. 7.
Skin. 596. 599.

Vide 6. Mod.
179.

TREVOR, *Attorney General*. Let the treason be what it will, of whatever sort it is, to assist such a person charged with it to escape, is treason.

HOLT, *Chief Justice*. Suppose the treason were for coining, &c. would it be treason to assist such a person to escape?

TREVOR, *Attorney General*. The question is, Whether this man be charged with *high treason*, as you have alledged it in the warrant?

ROKEBY, *Justice*. Does it appear to us, that this offence is not bailable?

* [81]

HOLT, *Chief Justice*. I remember my LORD CHIEF JUSTICE HALE, at *Norwich assizes*, was of opinion, that a *justice of peace* might direct a warrant to any person to execute it; and in a case that came before him there, the warrant was directed to the constable of one parish to be executed in another parish; which was done, and held to be good.

A JUSTICE OF
PEACE may direct
a warrant
to any man to
execute.

2. LEO. 275.

At another day this matter was again debated.

HOLT, *Chief Justice*. In *Anderson* it was the opinion of all the Judges, that the *privy council*, or any one of them, might commit (b); and certainly the *secretary of state* is one of them.

(a) See 4. Inst. 176. 2. Hale P. C. 108. 2. Hawk. P. C. ch. 13. s. 18.
4. Bl. Com. 287.

(b) 1. Anderson, 297.

SHOWER.

THE CASE OF
KENDAL
AND OTHERS.

Commitment
by one of THE
PRIVY COUN-
CIL.

2. Will. 275.
11. St. Tr. 317.
319.
2. Hawk. P. C.
ch. 16. f. 4.
med.

SHOWER. As for that resolution, it may well be suspected for law; it was not judicial: and there have been instances where Judges have given different resolutions under their hands from those which they have given judicially when they acted under an obligation of an oath; and, with submission, one of the *privy council* cannot commit, for he cannot give an oath: and it seems against the reason of our constitution that the same officer should have power to commit, and yet cannot administer an oath, which I take to be necessary upon every commitment; for my LORD COKE (a) says, that all commitments must be upon oath. Then it is very extraordinary that an officer shall have power to commit, and yet he can neither administer an oath, nor take a recognizance to prosecute, nor take bail, though his judgment tells him that the offence is bailable: this seems very inconsistent. These extraordinary commitments are not favoured in our law; and in the old times such commitments were very seldom. Then 25. *Edw.* 3. c. 4. is one of those statutes that vindicates the liberty of the subject in respect of extrajudicial commitments; for it is said there, "none shall be apprehended upon suggestion to the king or his council, unless by indictment or presentment, or by process at the common law." And in the fourth year of *Charles the First* these general commitments *per mandatum domini regis* were thought a great oppression to the subject (b). My LORD COKE (c) says, that before commitment there must be an oath; which in this case could not be. It is true, the whole privy council may examine upon oath; but that one privy councillor may do so I do not find any where. In *Prynne* (d) there is a notable record, where the person was impeached by the commons in parliament for a riot and assault on several lords of the council; from which I infer, * they would not have any recourse to the legislators, had the privy council themselves such a power to commit. I confess the privy council may cite, and so may the ecclesiastical court summon, but they cannot commit.

* [82]

Skin. 299.

As to my other exception: In 2. *Inst.* 705. it is said, that a new gaol cannot be erected without an act of parliament; How then can the houses of these messengers be as so many prisons? I think there are forty-two messengers; and if their houses should be lawful places of confinement, there would be so many new gaols or prisons erected without authority of parliament, which ought not to be. 5. *Ed.* 3. No. 68. In the 12. *Rep.* 129. indeed, A MESSENGER is mentioned; but nothing can be drawn from thence that he can therefore keep a prison. So that if *Sir James Montgomery* was not in legal custody, the assisting of him to escape is no fault. There are other places of confinement besides messengers houses that have been questioned whether they be prisons or not; so it has been doubted, whether THE TOWER of London be a prison, or not, within the *habeas corpus act*.

(a) 2. *Inst.* 51.

(b) See 16. *Car.* 1. c. 10. 2. *Hawk.*
P. C. ch. 15. f. 71.

(c) 2. *Inst.* 32.

(d) *Prynne's Animadversion* on the
Fourth Institute, page

Michaelmas Term, 7. Will. 3. In B. R.

HOLT, *Chief Justice*. THE TOWER is a prison without doubt. THE CASE OF
KENDAL
AND OTHERS.

SHOWER. My next exception was, That the warrant does not express what the treason is ; and there may be a treason the assisting of which is not treason ; as the harbouring of jesuits or counterfeiters of money, it is only a misprision of treason. My inference is, that if *Sir James Montgomery* was charged with such a treason, the assisting of which would not make me guilty of treason, then my assisting him to escape is not treason (a). Then if the intendment be general, it shall be taken for the liberty of the subject ; so is *Vaughan*, 136. 157. where it also appears, that the return to a *habeas corpus* ought to be certain ; and so it was resolved in *Busbell's Case*. So that if it cannot appear to your Lordships to be treason, with submission, we ought to be bailed within the *habeas corpus act*.

LEVINZ, *Serjeant, on the same side*. If *Sir James Montgomery* himself were here he must have been bailed, by reason of the uncertainty of the crime expressed in the warrant of commitment ; and shall we be in a worse case than he himself would have been ?

* Returns in all cases ought to be particular, and certainly express the cause (b). There are several cases of prisoners committed and delivered by *habeas corpus* ; and the returns of the officers having custody of them in THE FLEET, THE TOWER, and THE GATEHOUSE, are all certain. The old law is, that all commitments shall be to the county gaol (c) ; and the statute of 5. Hen. 4. c. 10. that justices of peace shall commit to the county gaol, is but declaratory of the common law ; and a messenger's house certainly is not the county gaol : indeed, a man may be committed to a messenger's custody for twenty-four hours, &c. while the matter is under examination. There is *Howell's Case* (d), where the power of the *secretary of state* is questioned, but I am loth to meddle with it ; and I think we need not have made all this stir about it ; we only desire to be bailed. It is plain, that the warrant must be legal. And CHIEF JUSTICE HALE (e) is as plain, that the rescuer shall not be arraigned till the principal be attainted. Then if it be true that *Sir James Montgomery* is dead, it is morally impossible for these persons ever to be attainted.

* [83]

Returns to be particular and certain.

TREVOR, *Attorney General*. In *Howell's Case* the writ of *habeas corpus* was directed "to the steward and marshal of the "Marshalsea," who made return, that the said *Howell* was committed to his custody *per mandatum FRANCISCI WALSINGHAM, Militis, principalis secretarii, et unius de privato concilio domine regine* ; and that return was by the Court held insufficient, because the cause why he was committed was not set down in the return : and there the Court took a difference, where one is committed by

The cause of commitment to be set down in the return.

Post. 85.

(a) Dyer, 296. a. 12. Co.
(b) Moor, 839.
(c) Britton, 19. 92. Capt. Norwood's Case. But see 6. Geo. 1. c. 19. and

2. Hawk. P. C. ch. 16. s. 6.
(d) 1. Leon. 70.
(e) Hale's P. C. 116.

Michaelmas Term, 7. Will. 3. In B. R.

THE CASE OF one of the privy council, for in such case the cause of the committing ought to be set down in the return; but where the party is committed by the whole council, there no cause need to be alledged.

It is objected, that the treason not being expressed, therefore the aiding and assisting of him cannot be treason; for, say they, this treason might be for harbouring jesuits, counterfeits of coin, &c.; but the receiving of jesuits, &c. is not an aiding and abetting of them: but, with submission, the assisting any of these persons is treason, though these facts were made treason by act of parliament.

* [84] * So I think it is not necessary to insert the overt-act in the warrant of commitment, the species of treason is not usually mentioned there. I do agree, that upon the trial of the accessory, there must be the attainer of the principal produced: but here in treason all are principals; and let them take advantage of that at the trial.

2. Hawk. P. C. c. 21. s. 3. As for their objection, that no person shall be committed but to the county gaol, this is not so; for then no man could be committed to THE TOWER, THE GATEHOUSE, &c.

HAWLES, *Solicitor General*. These commitments in cases of high treason have varied in all times; sometimes the particular facts have been expressed, and sometimes not; and yet thought good either way.

Commitments without an oath. As for the objection, that an oath is necessary to be made before any commitment, that need not be; there are many cases where persons may be committed without any oath at all: so THE HOUSE OF COMMONS may commit, and yet they cannot administer an oath: so a constable may commit without any oath, *Staundf.* 32.

Then as to the objection concerning THE MESSENGER, it is out of the case; for though his house be no gaol, yet the assisting of one to escape from thence is as criminal as if he had assisted to escape from the county gaol. For being with the messenger while he was under examination, he was in the custody of the law, and it is not the breach of the wall that is a breach only of prison; for, as *Bracton* observes, to assist a man to escape that is going to be executed is a breach of prison: so that we conceive the commitment to be lawful, and that they ought not to be bailed.

HOLT, *Chief Justice*. Indeed you might have spared that question about the secretary's power to commit; it seems to have been made more for delight than for necessity: but in *Anderson* it is plainly resolved; and so it is in 1. *Leon.* 71. that he has such power (a). But that which always puzzled me is, What authority there was

(a) 1. Bl. Com. 338. 1. Bl. Rep. 316. 2. Hawk. P. C. ch. 16. s. 4. tion of these cases, 11. State Trials, 557.—And see Lord Camden's Exposition.

Palm. 558.

1. Sid. 78.

1. Salk. 347.

2. Hawk. P. C.

c. 16.

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to commit at common law? and why Justices of *gaol delivery* at common law might impanel a jury to enquire, &c.

THE CASE OF
KENDAL
AND OTHERS.

As to the objection about the commitment to A MESSENGER, surely the party may be committed to him during examination. Indeed I do take it, that generally the commitments ought to be to the common gaol, especially since the *habeas corpus* * *act*, that the party may better take out a *habeas corpus*; though you will find in my LORD CHIEF JUSTICE HALE's *Pleas of the Crown* (a), that the breaking of other prisons is felony. Now consider this, that if an act of parliament make an offence felony, and there is not one word as to the accessaries, yet they shall be felons; then why should not these persons that are in the nature of accessaries to treason be likewise guilty of treason?

* [85]

But, MR. ATTORNEY, I very much doubt whether you ought not to have specified what sort of treason it was, and that he had committed it; as for the purpose, if it had been for the conspiring the death of the king, or for adhering to his enemies, &c. then the assisting the escape of such a traitor comes under the same species of treason.

Then it is a great doubt with me, Whether you should not aver that he did actually commit the treason?

TREVOR, *Attorney General*. With submission, it would be too much to say in the warrant of high treason, that the party was guilty. Indeed in the indictment we must alledge it.

HOLT, *Chief Justice*. I think it must be considered of, though I doubt very much as to the not specifying of the treason, that the particular sort ought to have been expressed in the warrant.

Commitment
for treason
should specify
the particular
sort of treason.
Ante, 83.

ROKEBY, *Justice*. Certainly a *conservator of the peace* at the common law might have committed, and to administer an oath is incident to his office; so that I take it, that a *secretary of state* is in nature of a *conservator of the peace*, and may as well commit now, as the other could at common law (b). But indeed it seems to me that they areailable, because it is not expressed what sort of treason it was. As to THE MESSENGER, I take him to be only a carrier of the party to prison, and that he is not in the nature of a gaoler.

2. Hawk. P. C.
c. 16. l. 16.

EYRE, *Justice*. Upon the whole, I think it reasonable that they should be bailed.

HOLT, *Chief Justice*. Then let them be bailed.

(a) 1. Hale P. C. 601. 607. See on this passage in delivering the judgment of the court of common pleas in the case of Entick v. Carrington,
2. Hawk. P. C. c. 21. l. 1. 7. ch. 18. f. 16.

(b) See the opinion of LORD CAMDEN 11. State Trials, App. 316.

To an *indebitatus* and *quantum meruit*, if the defendant plead that he gave the plaintiff a hat, which he accepted in satisfaction of the debt; a REPLICATION protesting that the defendant did not give the hat in satisfaction, and traversing that he received it in satisfaction, is good.

- S. C. 2. Salk. 627.
- S. C. Comb. 346.
- S. C. 1. Ld. Ray. 60.
- S. C. Carth. 347.
- S. C. 12. Mod. 85.
- Post. 136.
- 9. Co. 80. b.
- Sty. 263. 239.
- Winch. 76.
- Cro. Eliz. 68. 103.
- Sty. 263. 239.
- 1. Brownl. 107.
- 1. Com. Dig.
- "Accord" (C.).
- 2. Term Rep. 24.

INDEBITATUS ASSUMPSIT and a *quantum meruit*. The defendant pleaded in bar, that he gave the plaintiff a beaver hat, which he accepted in satisfaction of the debt. The plaintiff replied by protestation, that the defendant did not give the hat in satisfaction; and traversed, that he accepted it in satisfaction: and upon demurrer,

IT WAS OBJECTED *on the behalf of the defendant*, that this was an immaterial traverse, because the giving is the directing matter, which ought to have been traversed, and not answered by protestation; like the resolution in *Pinnell's Case* (a), which was an action of debt on a bond, of the penalty of sixteen pounds, for payment of eight pounds ten shillings on a certain day; the defendant pleaded, that before that day he, at the request of the plaintiff, paid him five pounds, which he accepted in full satisfaction of the debt; but because he pleaded the payment of the five pounds generally, and not in full satisfaction of the whole debt, the plaintiff in that case had judgment. And there it was held, that the manner of tender and payment shall be directed by him who makes it, and not by him who accepts it; so that it is not material how the person to whom the thing is given accepts it; for if it be accepted, it must be as the giver intended it; and therefore the plaintiff ought to have traversed the giving in satisfaction, for that is the most material part of the plea, and ought to have been put in issue. It is true, if it had been after a verdict, the giving and acceptance might have been taken to be reciprocal acts, viz. that the one would not have accepted it unless the other had given it in satisfaction; but upon a demurrer it is otherwise.

E CONTRA for the plaintiff. Either the giving or the acceptance of what is given in satisfaction may be traversed. This was the opinion of my LORD ROLLE (b), though he held it more proper to take issue upon the payment; but if the acceptance in satisfaction be traversed, there will be no occasion to answer the giving. It is a rule in philosophy, that *Quicquid recipitur est ad modum recipientis*; and there are instances in law to this purpose; as in an action of debt upon a bond (c), the defendant pleaded, that whereas the plaintiff was indebted to him for a load of lime, it was agreed between them, that the defendant should acquit him of the lime, and yet the plaintiff should accept it in satisfaction of the bond; and avers that he did accept it in satisfaction of the bond; and upon demurrer to this plea it was held ill; not because the defendant had pleaded the acceptance only, and not the giving in satisfaction, but because he ought to have pleaded the acceptance in satisfaction of the sum mentioned in the condition of the bond, and not of the bond generally; for that could not be discharged without a specialty (d).

- (a) 5. Co. 117. Moor, 677.
- (b) Stiles, 239.
- (c) Neale v. Sheffield, Yelv. 192.
- 3. C. Cro. Jac. 244. S. C. 1. Brownl. 107.
- S. C. 1. Bullst. 66.
- (d) 5. Co. 117. b. 9. Co. 79.
- Cro. Eliz. 68. 193.

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CURIA. Where a thing is pleaded by way of *concord*, it is issuable; but if the concord be not executed by giving and receiving, it cannot be pleaded in bar to the action (a): therefore the best way of pleading it, is by setting forth, that the thing was given and received in the full satisfaction, &c. according to the resolution in *Pinnell's Case*. But both are traversable; as for instance: The condition of a bond was (b), that if the defendant *compounded* with one Earle for his lands, then he should pay the plaintiff thirty pounds; in an action of debt brought on this bond, the defendant pleaded, that he had not made any *composition* with Earle, &c.; the plaintiff replied, that Earle did grant a rent-charge in fee to the defendant in satisfaction of his title; and so he made a *composition*; the defendant *protestando* that Earle non concessit, *pro placito dicit* that he did not accept it in satisfaction; and it was adjudged a good plea, without traversing the grant: for as in that case there could not be any composition without the consent of the parties, which depended purely upon the acceptance, which the defendant denied to be in satisfaction of his title, so in this case, the denial of the acceptance implies, that the thing was not given in satisfaction.

YOUNG
against
RUDD.

See Heathcoat
v. Cruikshanks,
2. Term Rep.
24.

And therefore judgment was given for the plaintiff.

(a) 1. Com. Dig. 3d edit. 135. *notis*.

(b) Hob. 178.

Smith against Crompton.

* [88]
Case 40.

IN AN ACTION ON THE CASE for negligently keeping his fire, whereby the plaintiff's house was burnt (a), there was a doubtful evidence given at the trial before THE CHIEF JUSTICE at the *nisi prius*, and the jury gave a verdict for the defendant.

In an action against a person for negligently keeping his fire, whereby the plaintiff's house was burned, if the jury find a verdict for the defendant, the Court will not grant a *new trial* on the ground that the evidence was doubtful, and the judge dissatisfied with the verdict.

* It was moved several times for a *new trial*, because the evidence was very doubtful upon which the verdict was given against the plaintiff; and it was insisted on his behalf, that though it is true, that in an information of perjury (b) where the defendant was found *guilty*, the Court would not grant a new trial, though it appeared there was no reason for such a verdict, unless the king's counsel would consent to it; yet in an action of debt brought by an informer, and a verdict for the defendant, the Court may grant a *new trial*, because the party has an interest; and this is the difference taken in the Books. It might be a thing of ill consequence, if it should not be in the power of the Court to grant new trials in cases where there are apparent reasons for so doing; as where *excessive damages* are given for words (c), or where two verdicts

S. C. 2. Salk. 644. Post. 181. Carth. 202. 425. Sira. 1105. Cowp. 37. 230. 601. 1. Term Rep. 34. 2. Term Rep. 114. 4. Term Rep. 468. 753. 8. Mod. 220. 264. Carth. 498. Fitzg. 40.

(a) See 6. Anne, c. 31. s. 6. Post. 181.

(b) 1. Sid. 49, 50.

(c) See Clark v. Udal, 2. Salk. 649. Redshaw v. Brooks, 2. Will. 405. Wilford v. Berkeley, 1. Burr. 609. Benson v. Frederick, 3. Burr. 1245.

Hayward v. Newton, Sira. 540.— But the general rule is, that in personal torts the Court will never grant a new trial for *excessive damages* unless they are such as manifestly shew the jury to have been actuated by passion, partiality, or prejudice. Cowp. 230.

Michaelmas Term, 7. Will. 3. In B. R.

SMITH
against
CROMPTON.

have been given against one defendant, and in many other cases (a).

But on the other side it was said, that no new trial could be granted in this case, though the Court should see any reason for it: and the case of *Sir John Jackson* (b) was chiefly relied on, who was discharged of a great debt at the assizes in *Cumberland*, by the perjury of *Fenwick* and *Holt*; who being indicted for the same crime, *Sir John* procured the witnesses to be arrested who could prove the perjury, so that they could not come to the assizes to give evidence, and thereupon *Fenwick* and *Holt* were acquitted; and though this practice appeared plainly upon several affidavits, yet the Court would not grant a new trial, but ordered an information against *Sir John Jackson*; upon which he was found guilty, and fined one thousand marks.

Afterwards a new trial was denied in the principal case (c).

(a) See 5. Com. Dig. "Pleader" (R. 17.) the 8vo edition by Mr. Kyd, where all the cases on this subject are collected.

(b) 1. Sid. 149. 153.

(c) In S. C. 2. Salk. 644. it is said,

that THE CHIEF JUSTICE was dissatisfied with the verdict, but that the reason of refusing a new trial was, because it was a hard action.—See also Sparks v. Spicer, 2. Salk. 648. Dunkley v. Wade, 2. Salk. 653.

Case 41.

Plummer against Lea.

If A. have judgment in *scire facias* and become bankrupt, the assignee of the original judgment shall have execution without a new *scire facias*.

1. Salk. 108, 109. III.

6. Mod. 103.

ONE *Alexander Holt*, in the seventeenth year of *Charles the Second*, recovered a judgment against the defendant, and had a *testatum scire facias* to the *terretenants*. They appeared and pleaded; and there was a verdict against them at the assizes in *Suffolk*, and judgment thereupon. Afterwards *Holt* became a bankrupt, and the commissioners assigned the original judgment to *Plummer*, who now moved the Court that it might be entered, to entitle him to the benefit of the judgment upon the *scire facias*; which was ruled accordingly, without bringing a new *scire facias* (a).
QUOD NOTA.

2. Jo. 203. 1. Mod. 93. 4. Bac. Abr. 411.

(a) See *Hewit and Others, Assignees of Bibbins, v. Mantell*, 2. Will. 372.

TRINITY TERM,

The Seventh of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt,

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

* *Dalston, Bart. against Janfon.*

* [89]

Cafe 42.

LONDON, } **J**OHAN DALSTON, knight and baronet, complains
to wit, } of *Jeshua Janfon*, a common carrier, in custody of
the marshal of the *Marshallsea* of the lord the king, being before
the king himself, for that, to wit, that whereas the aforesaid *Jeshua*,
on the 16th day of *March*, in the year of Our Lord 1693, and long
before and always afterwards, hath been, and now is, a common
carrier of goods and chattels, and for his profit hath been accus-
tomed to carry the goods and chattels of all persons whatsoever
requiring the carriage thereof from *Wakefield*, in the county of
York, unto *London*, and from *London* aforesaid unto *Wakefield*
aforesaid, for all the said time, for a reward to be therefore had.
And whereas by the law and custom of this kingdom of *England*,
every common carrier of goods and chattels, who receives the
goods and chattels of any person so to be carried, is bound to keep
and carry the same without subtraction and loss, so that by the
default of such common carrier, or his servants, damage may not
in any manner come to pass. And whereas the said *John*, on the
same 16th day of *March*, in the year of Our Lord 1693 aforesaid,
at *London* aforesaid, that is to say, in the parish of the *Blessed Mary*
of the *Arches*, in the ward of *Cheape*, was possessed of the goods and
chattels following, that is to say, of one deal box, and one hundred

Precedent of a
declaration, in
which an action
on the case, on
the custom of
the realm, and
trower are
joined.

Trinity Term, 7. Will. 3. In B. R.

DALSTON,
BART.
against
JANSON.

pieces of gold coin, called guineas, of lawful money of *England*, as of his own proper goods and chattels ; and the aforesaid *John* being thereof so possessed, on the same 16th day of *March*, in the year of Our Lord 1693 aforesaid, at *London* aforesaid, to wit, in the parish and ward aforesaid, he the said *John* then and there delivered the box aforesaid, with the said one hundred pieces of gold coin, called guineas, to the aforesaid *Joshua*, to carry the same safely and securely from *London* aforesaid unto *Wakefield* aforesaid for a reward ; and the aforesaid *Joshua* then and there had and received the said box, and the said one hundred pieces of gold coin, called guineas, being therein to be carried and delivered in form aforesaid : nevertheless the said *Joshua*, at any time afterwards until now, hath not delivered the box aforesaid, with the said one hundred pieces of gold being therein, to him the said *John* : but the box aforesaid, and the said one hundred pieces of gold coin being therein, afterwards, to wit, on the 17th day of *March*, in the year of Our Lord 1693 aforesaid, at *London* aforesaid, in the parish and ward aforesaid, for default of the good keeping of him the said *Joshua*, were lost. And also whereas, on the 16th day of *March*, in the year of Our Lord 1693 aforesaid, at *London* aforesaid, to wit, in the parish and ward aforesaid, the said *John* was possessed of other goods and chattels following, to wit, of one deal box, and one hundred pieces of gold coin, called guineas, of lawful money of *England*, as of his own proper goods and chattels ; and being so possessed thereof, he the said *John* afterwards, to wit, on the same 16th day of *March*, in the year of Our Lord 1693 aforesaid, at *London* aforesaid, in the parish and ward aforesaid, casually lost those goods and chattels out of his hands and possession ; which said goods and chattels afterwards, to wit, the same 16th day of *March*, in the year of Our Lord 1693 aforesaid, in the parish and ward aforesaid, came to the hands and possession of the aforesaid *Joshua*, by finding ; nevertheless the said *Joshua*, knowing the said goods and chattels last mentioned to be the proper goods and chattels of the aforesaid *John*, and of right to belong and appertain to him the said *John*, yet contriving and fraudulently intending craftily and subtilly to deceive and defraud the aforesaid *John* in this behalf, hath not yet delivered the said goods and chattels last mentioned to him the said *John*, although often requested, &c. ; but the goods and chattels last-mentioned afterwards, to wit, on the 17th day of *March*, in the year of Our Lord 1693 aforesaid, at *London* aforesaid, in the parish and ward aforesaid, converted and disposed of to the proper use and benefit of him the said *Joshua*, to the damage of him the said *John* of 15*l.* ; and thereupon he brings suit, &c.

On not guilty pleaded, judgment for the plaintiff.

Dalston

Dalston against Janfon.

Cafe 43

THIS was an action on the case brought against a common carrier upon the custom, and also a *trover* was laid in the same declaration. Upon not guilty pleaded, there was a verdict for the plaintiff.

An action on the case against a carrier on the custom of the realm and *trover* may be joined in the same declaration.

S. C. 12. Mod. 73.

* [91]

S. C. 1. Salk. 10.

S. C. Comb. 333.

S. C. 3. Salk. 204.

S. C. 1. Ld. Ray. 58.

S. C. 3. Ld. Ray. 115.

1. Roll. Abr. 6.

1. Vent. 365.

1. Sid. 244.

2. Will. 319.

It was moved in arrest of judgment, that these are different actions, and ought not to be joined in one and the same declaration; for one is grounded upon a *contract* in law, to which *non assumpsit* is the proper plea, and the other upon a *tort*; and it is for the same reason that a *trover* and an *indebitatus assumpsit* ought not to be joined, nor an *ejectment*, and an action on the case for scandalous words, though the same issue goes to both. But *not guilty* is not the proper issue to this action, for anciently the defendant pleaded specially to the neglect and misfeasance (a). It cannot be denied but that this action is founded on the *contract*; and for that, the authority of the case of *Boson v. Sandford* (b) is plain. An *ejectment* and an action for an *assault and battery* were joined (c), and the plaintiff had a verdict; but the Court was of opinion that this was the first precedent, for they sever in damages, and therefore they advised on it; but WINCH, Justice, was of opinion that it was not good.

To which it was answered, that it was my Lord Hobart's opinion in that very case, that the declaration was good after a verdict; and that of late no action had been brought against a common carrier but *trover* was joined with it (d). An action on the case for over-riding, and not delivering a horse according to a contract, and also for a conversion to the defendant's use, were joined together (e); upon *not guilty* pleaded, the plaintiff had judgment, though he might have demurred to the declaration, it being double; but by pleading the *general issue*, and that being found against him, it made the declaration good. So trespass for beating his servant, *per quad servitium amisit*, and an action on the case for keeping a dog accustomed to bite sheep, were joined in one declaration (f), and the plaintiff had judgment; though it may be a question whether trespass will lie for the last or not, for it is only a negligence to let the dog loose, for which trespass will not lie. It is not the *contract* which entitles the plaintiff in this case, for it is an action grounded upon a *tort*, and the issue and judgment are the same in both (g). It is true, there was the like declaration, issue, and verdict, in the case of *Matthew v. Hopkins* (h), and the judgment was arrested; not for the reason

(a) Winch. 29. See also 1. Term Rep. 31.

(b) 1. Show. 29. 3. Mod. 321. 3. Lev. 258. 2. Salk. 440.

(c) Bird v. Snell, Hob. 249. 1. Brownl. 235.

(d) 2. Lev. 101. 3. Lev. 99.

(e) White v. Reiden, Cro. Car. 20. 1. Lutw. 101.

(f) Ash v. Rapier, Easter Term, 26. Car. 2.

(g) See Gilbert's History of Common Pleas, 7. Bedford v. Alcock, 1. Will. 248. Dicken v. Clifton, 2. Will. 319.

(h) 1. Sid. 244. 1. Vent. 365. 1. Keb. 370.

DALTON
against
JANSON.

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now given, but because the plaintiff had alledged, that the defendant was a carrier on the tenth of *May*, and that he was possessed of the goods on the sixth of *May*, on which day he did deliver them, so that it did not appear he was a carrier on the day of the delivery. These are not actions of different natures, and therefore they may be joined; and the like has been done in many other cases; as *debt upon bond*, and *detinue*, were joined (a): so likewise *debt upon a penal statute*, and an *indebitatus assumpsit* generally for * tithes (b), and *non assumpsit* pleaded to both, which was a discontinuance to so much as related to the penalty; but it was the opinion of *TWISDEN, Justice*, that if the issue could have been *not guilty*, it might have gone to both (c). Agreeable to this is that distinction taken in *Buckmere's Case* (d), that in actions real founded upon a *tort*, a man shall have but one writ to recover lands to which he had several titles; but in personal actions, several *torts* may be comprehended in one declaration, because in these there is not so much regard to forms as in the other. Before the statute *de bonis asportatis in vita testatoris*, it was a question, whether an action would lie against the executor of a carrier? but now it is not doubted (e).

Skin. 66.
Comb. 47. 114.
Carth. 113.
Hob. 17.
Hard. 163.
Cro. Jac. 262.
330.
Palm. 523.
Herne's Pl. 76.
1. Sid. 36.
4. Co. 84.
Owen, 57.
2. Saund. 380.
2. Mod. 270.
Moer, 462.
Co. Lit. 89.
3. Med. 323.
Molloy, 209.

CURIA. A plaintiff cannot join two actions which require several issues; so that the question now is, Whether actions may be joined where the same pleading will answer both? In such cases as this, the defendant in former times pleaded particularly to the neglect; but it has been lately ruled, that *not guilty* is a good plea (f). But it seems strange, that *debt* and *detinue* should be joined, because those actions have different judgments.

Upon the first debate of this case, they inclined for the plaintiff. But afterwards, when *ROKEBY, Justice*, came into the court in *Michaëmas Term* following, they were all of opinion that these were distinct actions; for an action against a *common carrier*, upon THE CUSTOM OF ENGLAND, is not so much upon a *tort*, as upon a *contract*; for by receiving the goods, and taking a reward for the carriage, the defendant implicitly undertakes to deliver them safely, and therefore the law implies a *contract* to answer the value, if robbed. The case of *Matthew v. Hopkins* (g) the carrier of *Tiverton*, was upon the common custom of the realm, for negligently carrying a bag of wool, in which there was fifty pounds, and in the same declaration there was a

(a) Fitz. Abr. "Brief," pl. 3. Thelwall's Digest, Bk. 10. ch. 15. f. 6.

(b) Bro. Abr. "Joinder in Action," pl. 97.

(c) Wright v. Beale, 1. Sid. 223. 1. Lev. 141.

(d) 2. Co. 86.

(e) But a plaintiff cannot join in the same declaration a cause of action, as *executor*, with another which accrued in

his own right, *Cockeril v. Knyaston*, 4. Term Rep. 277. ; nor can a count on a promise made by a defendant, as *administrator*, to pay money received by him, as *such*, to the plaintiff's use, be joined with other counts on promise made by the *intestate*, *Jennings v. Newman*, 4. Term Rep. 347.

(f) 2. Vent. 77.

(g) 1. Sid. 244. 1. Vent. 365.

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trover for the said money; and it was held, that these were different actions, and ought not to be joined, which is the case in point.

DALTON
against
JANSON.

So JUDGMENT was given for the defendant (a).

(a) But it is now settled, that an action against a common carrier on the custom of the realm and an action of *trover* may be joined in the same declaration, *Dickson v. Clifton*, 1. Will. 3. 319.

See also 1. Vent. 223.; *Bedford v. Alcock*, 1. Will. 3. 52.; *Mast v. Goodson*, 1. Bl. Rep. 848.; *Brown v. Dixon*, 1. Term Rep. 274.

Alice Masters, Administratrix of Charles Masters,
against Lewes.

• [93]
Case 44.

INDEBITATUS ASSUMPSIT against *Lewes*; and upon *non assumpsit* pleaded, the cause was tried before HOLT Chief Justice of the king's bench in GUILDHALL, London; and it was given in evidence,

To an *indebitatus assumpsit* brought by an administrator against the debtor of the intestate, the defendant cannot plead in bar, that a creditor of the intestate had entered a plaint in the sheriff's court against the ordinary, and that the debt, for which the action was brought, was thereby attached in his hands at the suit of the creditor.

* That *Masters* was indebted to *Gosfright*, and *Lewes* was indebted to *Masters*, who died intestate: That the defendant, after the death of *Masters*, received two hundred and fifty pounds due to the said intestate for wages, as master of a ship; and before any administration was granted to the plaintiff, for that was contested by *Gosfright*, he (*Gosfright*) levied a plaint against the *Archbishop of Canterbury*, as ordinary, for the debt due to him. There was a *nihil* returned in the sheriff's court of London, and upon four summons there was a *scire facias* and judgment against him, and the money of the ordinary was attached in the defendant's hands, which was afterwards condemned and received by *Gosfright*: then administration was granted to the plaintiff, who brought this action against *Lewes*, and had judgment to recover. But whether the point in law was a good bar to her action (a), it was referred to the opinion of the Court by THE CHIEF JUSTICE himself, to whom it was referred at the trial.

S. C. Antie, 75.
S. C. Carth. 344.
S. C. 1. Ld. Ray. 56.
S. C. Skin. 516.
S. C. 3. Salk. 49.
S. C. Holt, 325.
429.
S. C. Comb. 347.
T. Jones, 165.
1. Roll. Abr. 551.
Cro. Eliz. 593.
Ld. Ray. 347.
Dougl. 380.

It was argued, that such an attachment was well warranted by the custom of London for above one hundred and fifty years; that there had been no writ of error in all that time brought upon any such judgment, neither was there any precedent to the contrary. The objections against it are,—FIRST, That by this means the administrator will be liable to a *devastavit*.—SECONDLY, That no such action will lie in the sheriff's court against THE ORDINARY. As to THE FIRST OBJECTION, this can be no *devastavit* in the administrator; for if he be sued, he may plead *plene administravit*, which will be good, especially in this case, where no goods came to his possession. Then as to THE SECOND OBJECTION, by the

(a) The custom of *foreign attachment*, as in the present case, was always pleaded specially, *Skin. 639. Salk. 280.*

1. Ld. Ray. 180. but it may now be given in evidence under the general issue, 3. Will. 297. 2. Bl. Rep. 834.

statute

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ALICE MAS-
TERS, ADMI-
NISTRATRIX
OF CHARLES
MASTERS,
against
LEWES.

2. Inst. 397.

* [94]

statute *Westminster the Second*, c. 19. THE ORDINARY was liable for any debt so long as he had goods in his hands, which act was made in affirmance of the common law. Now until administration be granted, THE ORDINARY represents the person of the intestate. There are many customs in London, which are allowed there, and in no other place; as arresting before a debt is due, &c. (a) and they are the proper judges of their own usages; and this Court will presume that they have acted according to custom, unless the contrary appears. So in London, an executor shall be charged to pay a debt upon a simple contract of his testator (b); and this was held a reasonable custom.

* *E contra*. The plaint is entered against the archbishop, and he is summoned, which ought not to be; for the money being in London, the Bishop of London, if any body, ought to be summoned.

BUT THE CHIEF QUESTION was, Whether this is a suit within the custom of foreign attachments in London?

W. 2. c. 19.

And as to that matter, IT WAS ARGUED, that this is not a reasonable custom; for at common law, before the statute of *Westminster the Second*, tho' THE ORDINARY could not sue for or release a debt due to the intestate, yet he might seize such goods which he found to be in the intestate's possession, and dispose them at his will, or to pious uses; and it was a question, Whether debt would lie against him if he did otherwise? for the creditors of the intestate could not call him to account, because the law adjudged him the fittest person to take care of the estate. It is true, the common law was a little defective in this matter; but now by that statute, debt will lie against him for such goods which shall come to his possession; and the reason which is given in the statute, is the same which was before; for if THE ORDINARY will intermeddle with the goods, he shall account as an executor ought to do; and this is the very ground of the writ in *Fitzherbert* (c): "*PRÆCIPE A. episcopo Lincoln. ad cujus manus bona et catalla quæ fuer. B. qui obiit intestatus, ut dicitur, devenerunt, &c.*" and for this very reason, if THE ORDINARY die, his executor shall be liable. Now if he cannot be sued but where the goods of the intestate *devenerunt* to his possession, then the plaint brought against the archbishop is wrong; for he had no goods of the intestate in his hands, and is a mere stranger to the suit and judgment, and therefore is no proper defendant; for which cause this attachment is not good. Since the statute 31. *Edw. 3. c. 11.* THE ORDINARY is compellable to grant administration to the next of kin, which if he refuse, the court of king's bench will grant a *mandamus* to compel him. Now here is a plaint brought against AN ORDINARY, to whom the right of granting administration belonged, and who never refused to grant it, and who cannot be answerable, unless he actually intermeddle with the goods; but here he is condemned to answer

Carth. 457.

Comb. 454.

1. Lev. 187.

1. Saik. 38.

1. Sid. 280. 370.

2. Sid. 114.

(a) Ante, 75. Calthorp, 27. Hob. 36. 1. Vent. 29. Rell. Abr. 555. 1. Bac. Abr. 689. (b) Snelling's Case, 5. Co. 82. Cro. Eliz. 409. (c) Fitz. N. B. 120.

before

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before he knows any thing of the suit. The custom is, that if the defendant, who is really the debtor, appear, *the attachment against the garnishee* will be discharged, and then he must put in bail to render his body, or pay the condemnation money; but the archbishop cannot be compelled to do either, so he is not within this custom. * The authority which comes nearest to this case, is in *Dyer 244.* where one *Toft* was indebted to *Foxcroft*, and *Wilkinson* was indebted to *Toft*, who died intestate; THE ORDINARY granted administration to *Marshall*; then *Foxcroft* levies a plaint in *London* against THE ORDINARY, and upon a *nihil* returned, as in this case, the money was attached in the hands of *Wilkinson*, and recovered and paid to *Foxcroft*, and the administrator brought an action of debt for it; the defendant pleaded the custom of *foreign attachments in London*, and all the matter before mentioned, and upon demurrer to the plea, the plaintiff had judgment. Now though administration was granted in that case before the plaint levied against THE ORDINARY, which was not in this case, yet the reason of that judgment may govern this case; because THE ORDINARY can have no action against *Wilkinson* the *garnishee*, to recover the debt due to the intestate; therefore no action should lie against him; so in this case, because THE ORDINARY cannot sue, it is unreasonable he should be sued, and the custom will not extend to make him liable to such suit.

CURIA. The reason why money is attached in the hands of the *garnishee*, is to make the debtor appear. Now the defendant *Lewes* was never indebted to THE ORDINARY; therefore he could not be compelled to appear, by entering a plaint against the archbishop, to whom there was nothing due. There are several customs in *London* against law, as arresting the bail without a *scire facias* or *capias* against the principal, &c. But this custom cannot be supported by reason; and though their customs are confirmed by act of parliament, yet such customs which are contradictory to reason, and to the principles of the common law, shall not be allowed in the court of king's bench.

Afterwards in *Michaelmas Term* following IT WAS HELD, that no action did lie against the archbishop, and by consequence the plaintiff, in this case, had judgment.

Wilson against Guttery.

Cafe 45.

THE DEFENDANT was arrested on a Sunday, by a writ out of THE MARSHALSEA. And now the Court was moved to discharge him. BUT IT WAS DENIED; and he was directed to bring an action of false imprisonment.

Court will not discharge the prisoner.—S. C. 1. Salk. 78. Post. 449. 6. Mod. 96. Fort. 373. 6. Com. Dig. "Temps" (B. 3.). 3. Bac. Abr. 39, 40. 4. Term Rep. 377. 5. Term Rep. 194.

ALICE MASTERS, ADMINISTRATRIX OF CHARLES MASTERS, against LEWES.

* [95]

Dyer, 247. a. pl. 73.

Comb. 347. 475.

The

Cafe 46.

The King *against* Harpur.

An indictment for refusing the office of constable, ought to shew that the defendant was chosen by sufficient authority.

S. C. Comb. 328.

1. Mod. 13.

1. Salk. 175. 380. 2. Keb. 557. 6. Mod. 96. Post. 130. 179. Alleyn, 78. Stra. 920. 1144. Dougl. 534. 3. Bac. Abr. 100. 2. Burr. 728. 4. Com. Dig. "Indictment" (G. 3.). 4. Com. Dig. "Justice of Peace" (M. 8.). 2. Hawk. P. C. ch. 10. f. 46. ch. 25. f. 57. See Rex v. Burder, 4. Term Rep. 778.

AMOTION was made to quash an indictment, which set forth, that the defendant being qualified to be a constable, was *debito modo electus* to serve that office at *Iffington*; and that he had notice of it, but did not take the oath to execute that office.

The objection was, that the indictment should set forth, that he was chosen by one who had sufficient authority, and that he was summoned before a justice of peace to take the oath; and therefore it not appearing how he was chosen, and that he had notice, the indictment ought to be quashed (a).

(a) It is said S. C. Comb. 328. that the indictment was quashed,

Cafe 47.

Anonymous.

Post. 127. 130. 8. Co. 38. b. 11. Co. 43. b. 2. Roll. Rep. 3. Abr. 440.

NOTA. A *Just* may set a fine on a constable, but the *session* cannot.

1. Salk. 175. Savil, 94. 1. Ld. Ray. 70. 4. Com. Dig. 8vo. 696. 1. Bac.

Cafe 48.

Swales *against* Lowther.

If a man dwell on a farm in the parish of A. and has a small quantity of land in the parish of B. on which he feeds cattle for the purpose of being employed in husbandry in the parish of A. and not in the parish of B. the owner shall pay tithes for such agisted cattle to the parson of the parish of B.

Cro. Eliz. 446. 475. 702. Fitz. N. B. 53. 1. Roll. Abr. 645. 660. Cro. Jac. 576. Skin. 360. Moor, 919. Hard. 184. 3. Com. Dig. "Disines" (H. 5.). Fitzg. 298.

AMAN had a house and a great farm of arable land in the parish of *Kippax*, where he dwelt, and he had five acres of plowed land, and forty acres of pasture, in the parish of *Snillington*, upon which pasture he fed his cattle which were employed in husbandry in the parish of *Kippax*. The parson of *Snillington* libelled for tithes, for the agistment of cattle there. The defendant thereupon suggests, that by the custom of England no tithes ought to be paid for agistment of cattle kept for plough or pail.

And now a motion was made for a prohibition, because the plaintiff cannot libel for the agistment of cattle but for such as are fed in the same parish, and not elsewhere; and the pasturage of cattle used for husbandry in the same parish is not titheable, because the parson has tithes for them in another kind.

On the other side it was said, that the parson is to have a profit where the parishioner has any benefit, and that he is an inhabitant wherever he has land.

But THE COURT would not grant a prohibition upon the first motion, but gave the defendant leave to amend his suggestion, by adding, that he had arable land in *Snillington*, and exercised husbandry there; which was amended.

Afterwards

* Afterwards in *Michaelmas Term* it was moved again, and THE COURT were of opinion, that if the cattle depastured were not for plowing the land in the same parish where they are fed, he shall pay tithes, though they plow in another parish; and if he had more cattle than he employed for the plough in the same parish, he ought to pay tithes for them. But THE COURT ordered the defendant to make affidavit to ascertain the fact.

SWALES
against
LOWTHER.
Carth. 476.

Brockwell against Lock.

Case 49.

DEBT by the bailiff of THE PALACE COURT of the *Bishop of Rochester* for fees, upon execution of a judgment in that court, being twelvepence in every pound for any sum under a hundred pounds, and sixpence in the pound if above that sum; and this is by virtue of the statute 29. *Eliz. c. 4. (a)*, in which there is a PROVISIO, "that it shall not extend to fees taken or had within a city or town corporate." The plaintiff had a verdict.

The Bailiff of THE PALACE COURT of the Bishop of Rochester is not entitled to *topondage* under the 29. *Eliz. c. 4.* for executing a judgment of that court.

And upon a motion in arrest of judgment, because of that clause in the statute, it was alledged that this case was not within that PROVISIO, it being neither a city or town corporate where the execution was made. Now the reason why execution fees are not to be taken in such places is, because the jurisdiction is narrow, the sheriff is at less trouble, and not so much in danger of an escape; but here the jurisdiction of the bishop is as large as his diocese, and so not within the like reason. Bailiffs of franchises and liberties are named in the statute, and the plaintiff being such, and the place not within the proviso, he is entitled to this action; and it has been ruled, that where a bailiff of a franchise made execution upon a *scire facias*, he should have his fees by virtue of this statute.

S.C. 1. Salk. 331.
2. Jones, 185.
2. Roll. Rep. 59.
3. Leon. 268.
Cro. Car. 287.
Noy, 76.
1. Mod. 167.
4. Mod. 254.
Poph. 173.
Latch. 19 52.
6. Com. Dig.
"Viscount"
(F. 2.).
2. Bac. Abr. 466.
2. Term Rep. 155.

CURIA. An officer of a liberty shall have his fees for executing the process of this court; but it was never intended by the statute, that he should have any for executing judgments obtained in inferior courts.

Therefore this judgment was stayed.

(a) See 3. Geo. 1. c. 15.

* South against Allen.

Trinity Term, 7. Will. 3. Roll .

SURREY, } BE it remembered that heretofore, to wit, in the
to wit. } Term of Easter in the first year of the lord the king that now is, before the same lord the now king at Westminster, came William South, by Thomas Johnson, senior, his attorney, and brought here into the court of the said lord the king, then there, his certain bill against Robert Allen and John Wilson, in the custody of the marshal, &c. of a plea of trespass and ejection; and there are pledges of prosecuting, to wit, John Doe and Richard Roe, which said bill follows in these words, to wit, William South complains of Robert Allen and John Wilson, in the custody of

* [98]
Case 50.

SOUTH
against
ALLEN.

of the marshal of the *Marshalsea* of the lord the king, being before the king himself, for that, to wit, that whereas one *William Birch* and *Sarah* his wife on the first day of *May*, in the first year of the reign of the lord *James the Second*, now king of *England*, &c. at *Tooting-Graveney*, in the county aforesaid, by a certain indenture signed with his hand, and sealed with his seal, demised, granted, and to farm let, to the said *William South* one messuage with the appurtenances, and one barn, and one orchard, and one garden, situate, lying, and being in *Tooting Graveney* aforesaid, in the county aforesaid, to HAVE AND TO HOLD the tenements aforesaid, with the appurtenances, to the said *William South* and his assigns, from the said first day of *May* until the full end and term of five years from thence next-ensuing and fully to be completed and ended. By virtue of which said demise, the said *William South* entered into the tenements aforesaid, with the appurtenances, and was possessed thereof, until the said *John Wilson* and *Robert* afterwards, to wit, on the same first day of *May* in the year above-said, with force and arms, into the tenements aforesaid, with the appurtenances in and upon the possession of him the said *William South*, thereupon entered, and him the said *William* from his farm aforesaid, his term thereof not being ended, ejected, expelled, and removed, and him the said *William* from his possession aforesaid, so ejected, expelled, and removed, kept out and yet keeps out thereof, and other wrongs then and there to him did; against the peace of the said lord the now king, to the damage of him the said *William South* of one hundred pounds. And thereupon he brings suit, &c.

* [99]

And now here at this day, to wit, *Monday* next after eight days of *Saint Hilary* in this same Term, until which day the said *Robert* and *John* had leave to imparl to the said bill, and then to answer, &c. before the lord the king at *Westminster*, came as well the said *William South*, by his attorney, as the aforesaid *Robert Allen* and *John Wilson*, by *Edward Shaller*, their attorney: and the said *Robert* and *John* defend the force and injury when, &c. and say, that they are not thereof guilty, nor is either of them guilty in the manner and form as the said *William South* above declaring alleges; and of this they put themselves upon the country, and the aforesaid *William South* likewise, &c. Therefore let a jury thereupon come before the lord the king at *Westminster*, on *Saturday* next after eight days of the Purification of the *Blessed Virgin Mary*, and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid there, &c. Afterwards the process is thereupon continued between the parties aforesaid of the plea aforesaid by the jury being thereupon respited between them before the lord the king at *Westminster*, until *Wednesday* next after three weeks of *Easter* then next following, unless the justices of the lord the king assigned to take THE ASSIZES in the county aforesaid shall first come on *Thursday* the third day of *March*, at *Southwark*, in the county aforesaid, by form of the statute, &c. for want of jurors. At which day before the lord the king at *Westminster* cometh

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cometh the parties aforesaid by their attornies, and the said justices of the lord the king before whom, &c. have sent here their record before them had in these words, TO WIT, Afterwards on the day and at the place within contained before EDWARD HERBERT, Knight, Chief Justice of the lord the king, assigned to hold pleas before the king himself, and THOMAS JENNOUR, Knight, one of the barons of the exchequer of the said lord the king, assigned to take assizes in the county of Surrey according to the form of the statute, &c. came as well the within named William South, as the within written Robert Allen and John Wilson, by their attornies within contained. And the jurors of the jury whereof mention is within made being called likewise came; who being chosen, tried, and sworn to speak the truth concerning the matter within contained, say upon their oath, that before the said time of the trespass and ejectment aforesaid above supposed to be done, one John Stone was seised in his demesne as of fee of and in one messuage, one barn, one orchard, and one garden, in the declaration aforesaid mentioned, with the appurtenances, situate, lying, and being in Tooting Graveney within written in the county aforesaid; and that the said John Stone, being so seised as aforesaid of and in the tenements aforesaid with the appurtenances, afterwards, &c. to wit, on the twenty-ninth day of October, in the thirty-third year of the reign of the lord Charles the Second, late king of England, made his last will and testament in writing, signed, sealed, and delivered by the said John Stone, in the presence of three credible witnesses, whose names to the said last will and testament, and in the presence of him the testator by the same witnesses subscribed, are in these English words following: viz. "The twentieth of October 1681, John Stone, of the parish of Allhallows Barking, London, citizen and merchant-taylor of London, being sick and ill, makes his will as follows: As to my estate, I give and dispose the same in manner following: Item, I give unto my sister Sarah Birch, wife of William Birch, * the rents and profits of all my lands and tenements lying in Tooting, in the county of Surrey, during her natural life; and to be paid by my executors hereafter named, into her own hands, without the intermeddling of her husband; and after the decease of my said sister Sarah Birch, I do give and bequeath the said lands and tenements, with the appurtenances, unto and amongst John Birch, Malme Birch, and Sarah Birch, children of my said sister, and to their heirs and assigns for ever equally, part and part alike," as by the said last will and testament of the said John Stone, to the said justices and jurors aforesaid in evidence shewn amongst other things, is more fully manifest and appears. And the jurors aforesaid, upon their oath aforesaid, further say, that the said John Stone, afterwards, to wit, on the first day of May, in the year of Our Lord 1682, at Tooting Graveney aforesaid, in the county of Surrey aforesaid, died so thereof seised of and in the tenements aforesaid, with the appurtenances. And the jurors aforesaid, upon their oath aforesaid, further say, that the within named Sarah,

* [100]

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against
ALLEN.

Sarah, one of the lessors of the plaintiff, and wife of *William Birch*, the other lessor of the plaintiff in the declaration aforesaid mentioned, and *Sarah Birch*, in the last will and testament of the aforesaid *John Stone* likewise named, is one and the same person, and not another and a different person; and that the tenements in the declaration aforesaid mentioned, and the lands and tenements in *Tooting*, in the county of *Surrey*, in the said last will mentioned, are one and the same lands and tenements, &c.; and that the same *Sarah Birch* in *plena vita modo existit*. And the jurors aforesaid, upon their oath aforesaid, further say, that the said *William Birch* and *Sarah* his wife, afterwards, and after the death of the said *John Stone*, and before the said time when, &c. to wit, on the thirtieth day of *April*, in the first year of the reign of the lord *James the Second*, now king of *England*, &c. in the tenements aforesaid, with the appurtenances, in the declaration and last will aforesaid mentioned in and upon the possession of the aforesaid *Robert Allen* and *John Wilson*, entered thereupon, and were thereof seised as the law requires; and that the aforesaid *William Birch* and *Sarah* his wife being thereof so seised, afterwards, to wit, on the within written first day of *May*, in the first year within written, at *Tooting Graveney* aforesaid, in the county aforesaid, by his indenture within specified, signed with his hand, and sealed with his seal, demised to the aforesaid *William South* the tenements aforesaid, with the appurtenances, to have and to hold the tenements aforesaid, with the said appurtenances to the said *William South* and his assigns, from the said first day of *May*, in the first year abovesaid, until the full end of five years from thence next following, and fully completed and ended. By virtue of which said demise, the same *William South* into the tenements aforesaid with the appurtenances, entered, and was thereof possessed, until the aforesaid *Robert Allen* and *John Wilson* afterwards, to wit, on the second day of the same month of *May*, in the first year abovementioned, with force and arms, &c. into the tenements aforesaid, with the appurtenances, in and upon the possession of him the said *William South* thereupon entered, and him from his possession ejected. But whether upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the said *Robert Allen* and *John* are guilty of the trespass and ejectment within written in manner and form aforesaid, as the said *William South* within against them complain, or not, the jurors aforesaid are wholly ignorant, and thereupon pray the advice of the Court here in the premises. And if upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, it shall seem to the justices here that the tenements aforesaid, with the appurtenances, by the aforesaid last will and testament of the said *John Stone*, are devised to the said *Samuel Birch* for the term of his life, then the jurors aforesaid upon their oath aforesaid say, that the aforesaid *Robert Allen* and *John Wilson* are guilty of the trespass and ejectment within written, in manner and form as the said *William South* within against them complains; and then they assess damages of him the said *William South* by occasion of that trespass and

Trinity Term, 7. Will. 3. In B. R.

and ejectment; besides his costs and charges by him about his suit in this behalf laid out to sixpence, and for these costs and charges to forty-eight shillings. But if upon the whole matter aforesaid, in form aforesaid found, the tenements aforesaid, with the appurtenances by the aforesaid last will and testament of the said John Stone are not devised to the said Sarah Birch for the term of her life, then the jurors aforesaid, upon their oath aforesaid say, that the said Robert Allen and John Wilson are not guilty of the trespass and ejectment within written, as the said Robert Allen and John Wilson within, in pleading, have alledged. And because the aforesaid justices and court here are not yet advised what judgment to give of and in the premises, a day is thereof given to the parties aforesaid until Thursday next after fifteen days of Easter, before the lord the king at Westminster, to hear their judgment of and upon the premises, for that the aforesaid justices and court here are not yet advised thereof, &c.

SOUTH
against
ALLEN.

South against Allen.

* [102]
Case 51.

IN EJECTMENT for lands in Tooting, upon the demise of William Birch and Sarah his wife, a special verdict was found, that John Stone was seised in fee of the lands in question; and by his last will and testament devised the rents and profits thereof to the said Sarah for life, to be paid by his executors into her hands, &c.

The question was, Whether this was a devise of the lands to her for life, or to the executors during her life? If it was to her for life, then the ejectment is well brought upon the demise of the husband and wife.

THOSE WHO ARGUED for the plaintiff held, that it was a good devise of the lands to the wife for life; for a devise of "the rents and profits" is a devise of the lands itself: and the subsequent words, "to be paid by his executors," will make no alteration of the estate; it makes them bailiffs to a particular purpose, but gives them no interest. As for instance: A man had issue a son and a daughter (a), and devised that his son should have his lands at the age of twenty-four years, and bequeathed forty pounds to his daughter at the age of twenty-one years, and appointed who should be his executor, and that he should have "the oversight and doing of all his lands, &c." until the several ages of his children; and it was adjudged, that the executor had no interest in the lands by those words, but only a stewardship for the benefit of the heir. So in Trinity Term, in the forty-first year of Queen Elizabeth, The testator being seised in fee, devised to his son in tail, and appointed that the overseer of his will

A devise of "the rents and profits of all my lands and tenements lying in Dale, to my sister during her natural life, to be paid by my executors into her own hands, without the intermeddling of her husband; and after her decease the said lands and tenements to be equally divided unto and amongst the children of my said sister; is not a devise of the lands to his sister for life, but to his executors in trust, to receive the rents and profits for her use during her life.

S. C. Ante, 63. S. C. 1. Salk. 228. S. C. Comb. 375. 1. Vern. 104. 256. 2. Vern. 310. 420. 1. Eq. Caf. Abr. 383. 1. Atk. 581. Caf. T. T. 164. 2. Vezey, 323. 1. Chan. Cases, 173. 176. Powell on Dev. 286. 1. Term Rep. 193. 4. Term Rep. 89.

(a) Carpenter v. Collins, Yelv. 73.

SOUTH
against
ALLAN.

should educate his son till twenty-one, "and receive, set, and let
" for him:" and it was adjudged (a), that the overseer had no in-
terest to make a lease for years in his own name, but that he
might make leases at will, and that his receipts were for the use of
the devisee. If a man devise that his land shall descend to his son;
and that his mother shall take *the profits* until he is of age; and
the mother marry, and die before her son come of age; the hus-
band shall not have the profits till that time, because no interest
was devised to the wife, but a confidence for the benefit of the
son (b). There can be but three pretenders to this estate; the
heir at law; the executors; or the devisee. The heir at law can-
not have it; for a devise of *rents and profits* is a devise of *the*
land itself. The executors have no estate by this devise; for
since the statute of wills (c), the law never construed a freehold
to pass by such words, without necessity required it; for nothing
is given to them, but that they shall pay, &c. and it is no consequence,
because they are to pay, that therefore they must have the estate in
the land (d). If a lease be made, upon condition that the lessee
shall not alien but to his children, and he afterwards devise part of
the term to his son, after the death of his wife, and make his exe-
cutors, and die; this is no forfeiture (e), because the law will not
intend it to be a devise to the wife by implication, to make a
breach of the condition in order to destroy an estate expressly de-
vised: so in this case, the rents being expressly devised to the wife
though they are to be paid by his executors, the law will construe
it to be a devise to the wife, because it does not appear that he
intended any interest to the executors.

* [103]

* THOSE WHO ARGUED *for the defendant* insisted, that it
was impossible to fulfil the intent of the testator, if the estate
should not be vested in the executors: his meaning was, that
the wife should receive *the rents* for her life, which she may
do, if the executors receive *the profits*. An executor *quatenus*
such, has nothing to do with the freehold, so that his office is
not concerned in this case; but the person is described who shall
receive the profits, and therefore such a construction must be
made of the will, that all the parts of it may stand together.
Can any reason be assigned why a devise of "*the rents and*
profits, &c." should pass *the land* itself, but only to fulfil the
intent of the testator by implication? For the right which is
given to a man to receive *the profits* entitles him to *the land*; but
if any thing appear in a will, to shew the intention of the testator
to be otherwise, there the law will never make it an estate by im-
plication. If an estate of freehold should be vested in *Sarah* the
wife, then her husband would have it during her life; and if he
should be outlawed or become a bankrupt, it would then be for-
feited for his life, and during that time she could not have *the*
profits; which is directly contrary to the will. The law has ap-

Comb. 375.
1. Vern. 104.
2. Chan Rep.
317.

(a) Pigott v. Garnish, Cro. Eliz.

674. 734.

(b) 2. Leon. pl. 380.

(c) 32. Hen. 8. c. 1. 34. Hen. 8.

c. 5. 12. Car. 2. c. 4.

(d) See 3. Com. Dig. "Devise" (N. 7.)

(e) Horton v. Horton, Cro. Jac. 74.

pointed

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pointed no particular words to dispose a freehold by will; therefore such words which shew the intention of the testator to devise such an estate, are sufficient to make it so. Now an executor cannot pay the rents into the hands of the wife, unless he has some estate in the land to sue for and recover the profits, if the tenants should deny payment. As to the case of *Carpenter v. Collins* (a), it is not to this purpose, for that was only an appointment to the executors to look after the land; they were no more than the overseers of the will, and had no legal interest by that devise.

South
against
Allen.

In *Trinity Term 1696*, JUDGMENT was given for the defendant by the opinion of TWO JUDGES against THE CHIEF JUSTICE, who held that the intent of the testator would be better fulfilled if these words should be construed to give *an interest* to the executors during the life of *Sarah*, because the will being penned against her husband, by such a construction he would have nothing to do with *the rents*. But by the penning this will, the executors have no interest by these words; for if they should, it would contradict the precedent devise of "the rents and profits" to the wife; and that would be to make a devise by implication to the executors, to * contradict an express devise to her for life.

* [104]

But by the opinion of the other Judges, the defendant had judgment.

(a) Cro. Eliz. 74. S. C. Yelv. 73. S. C. Brownl. 88.

Robinson against Gros court.

Case 52.

THE CHAMBERLAIN of London brought an action of debt against the defendant, for a forfeiture upon the breach of a bye-law made by the City of London, "that every person using the occupation of music and dancing within the city, and who shall be entitled to the freedom by patrimony or servitude, shall at the next court, after notice, take up his freedom in the Company of Musicians, on pain of forfeiting ten pounds for every offence," is a void bye-law.—S. C. Comb. 372. 5. C. Holt, 129. 1. Roll. Abr. 363. Post. 157. 167. 319. 438. 1. Mod. 10. 164. 6. Mod. 113. 177. Ray. 447. 1. Salk. 341. 352. Comb. 10. 121. 181. Skin. 371. 291. 2. Show. 267. 270. 4. Mod. 27. 1. Burr. 12. 14. 3. Burr. 1324. 1. Bac. Abr. 339. 1. Will. 233. 2. Will. 266. 1. Stra. 675.

H 2

" of

ROBINSON
against
COMMONS.

" of dancing, not being free of the said city, nor members of any
" fraternity, &c. For remedy whereof it was enacted by the
" mayor, aldermen, and commons, that every person using the
" occupation of *music* and *dancing* within the said city, who shall
" have a privilege to be made free by patrimony, shall at next
" court of assistants of the *Company of Musicians*, after notice,
" accept and take upon himself the freedom of the said company;
" and that every person who hath served an apprenticeship to the
" mystery of *music* and *dancing*, and not made free, and shall yet
" exercise his trade, shall forfeit ten pounds for every offence, to
" be recovered by action of debt or plaint, in the name of THE
" CHAMBERLAIN, in the mayor's court, one moiety after con-
" viction to be paid to THE CHAMBER OF LONDON, the other
" moiety to the master, wardens, and assistants of the said com-
" pany, for the use of the poor thereof."

IT WAS ARGUED for the defendant, that bye-laws are good or bad, in respect to the end for which they are made; as against frauds by *Blackwell-Hall factors*; against restraining the number of carts and coaches; but where the public is not concerned, a man shall not be restrained of his liberty by any law whatsoever.

[105]

* Therefore this bye-law is void :

FIRST, For the matter, because it is trivial. There are several trades so mean, that they are not within the intention of the statutes of bankruptcy, though those statutes speak generally of " all persons using the trade of merchandize, by way of bargain-
" ing, exchange, &c. or otherwise in gross or retail, or seeking
" a living by buying and selling, &c." All customs or laws which restrain trade, are to be taken very strictly, because at common law any man might use what trade he thought fit; which is now restrained by the statute 5. *Eliz.* c. 4. to an apprenticeship; but that being performed, he may set up his trade where he can most conveniently. A bye-law, without a custom of the place to support it, will not bind (a). Now the custom of this place is, " That no person not being a freeman, ought to use any art
" or occupation within the city of *London* for gain, not being
" free of the city, nor member of any fraternity;" so that this custom does not bind a man to be free of any particular company; and then the bye-law exceeds the custom, because though the person is free, yet if he do not take his freedom of THE COMPANY OF MUSICIANS, it is not good. This bye-law tends to deprive persons of their freedom though they are entitled to it by birth or service, and to take away the interest which they have, and which is vested in them by custom; for there may be a custom to appropriate particular privileges to a corporation, exclusive to all other persons; but a bye-law without a custom will not do it, because it is against the liberties of the people in general.

(a) 1. Salk. 192. 4. Mod. 27.

SECONDLY,

Trinity Term, 7. Will. 3. In B. R.

SECONDLY, The penalty is exorbitant, in making the forfeiture to be ten pounds for every offence: and this has often been adjudged in cases of lords of manors, who have set arbitrary fines on their tenants, that notwithstanding they had power to impose fines, yet it must be according to justice and reason (a). The case which most resembles this is that of *Paine v. Haughton* (b), where the king by letters patents granted a power to the mayor and commonalty of this very city to make bye-laws, and this was confirmed by act of parliament; afterwards they made a bye-law, "That no carman should use a cart in the city without a licence from the wardens of such an hospital, under the penalty of fifteen shillings;" and it was adjudged void, because it was in nature of a monopoly, and made only for the private benefit of such wardens, without any respect to the public good.

ROBINSON
against
GROSCOVAZ,

Comb. 43.
Skin. 247.

* THIRDLY, The penalty is to be recovered by action of debt, or plaint, in the name of THE CHAMBERLAIN in the mayor's court, and one moiety after conviction to be paid to THE CHAMBER OF LONDON. Now for this reason the bye-law is void, because it is to make them judges in their own cause; which is so contrary to the rules of law, that it has been held (c), that if a judge take the caption of a fine where he is a party, the cognizance is void.

* [106]

FOURTHLY, This custom is not applied to those who are free of the city, but it is laid at large to be in the mayor and aldermen for the time being, with the consent of other faithful people, to make bye-laws, &c. which may be people of any other place; and therefore it is naught, not being bound up to the freemen of the city; for so was the return in *Wagoner's Case* (d), viz. *de offensu communitatis ejusdem civitatis*.

FIFTHLY, Here is an arbitrary power given to the Company of Musicians, who by admitting a man into their fraternity, may take what fine they please; and if they refuse to admit him, there is no penalty given by this law to the person thus refused to compel an admittance, which is to put a certain number of men under the final jurisdiction and power of others; and that is contrary to a fundamental rule in the law. Therefore a bye-law made by the Merchant Adventurers (e), "That no man should buy or sell at four fairs within such a prince's dominions, without first compounding with them, and paying a fine," was held to be void, because it was an infringement of the liberties of all others not being free of that company.

SIXTHLY, But admitting this bye-law to be good, they ought to have returned, that the defendant had notice of it, and the rather because he is not one of their company; and it is a rule in all cases, where penalties are imposed by way of forfeiture, that the party ought to have notice of the law.

(a) See *Halton v. Hassell*, Stra.
1042. *Evelyn v. Chichester*, 3. Burr.
1717. *Grant v. Astle*, Dougl. 724.

(b) 1. Roll. Abr. 364.

(c) Co. Lit. 14.

(d) 8. Co. 122.

(e) 1. Roll. Abr. 363.

ROBINSON
against
GRISCOURT.

THOSE WHO ARGUED *on the other side* answered some of the objections, viz.

As to that objection, that the bye-law was void because a moiety of the penalty was to be for the use of the city; admitting it to be void for that reason, yet that will not make the whole bye-law so, because it may be good in part, and void in part. The same objection was taken in the case of *Player v. Archer* (a), where a moiety of the fine was appointed for the maintenance of CHRIST'S HOSPITAL, and the other moiety to the mayor and aldermen, &c. and there it was insisted, that the court of aldermen would be both judges and parties; yet a *procedendo* was not allowed.

• [107]

* Neither is this bye-law contrary to a custom, or excluding those who have right by birth to be freemen, because it is necessary that even in such cases the party ought to be free of some company, otherwise he cannot be free of the city; and if it be necessary that the defendant should be free of a company, why not of the *Company of Musicians*, which is the most agreeable to the art of dancing? And if he refuse, why may not the court of aldermen have power to impose him upon that company?

AS TO THE FIRST OBJECTION, that this bye-law is void because it is made about a trivial matter; the question is not about the meanness of the thing, but whether the subject-matter be within the jurisdiction of the court of aldermen; and if so, then whether they have not done what is reasonable?

And as to that, it cannot be denied but that *musicians* are an ancient brotherhood in *London*, and have been always under the care and government of the city; and the law now in question carries a conveniency in the very nature of it, for it is to keep good order in the city, that the youth should not be taught but by such who are approved masters in this art; and it is not the meanness of trades which exclude the people who exercise such trades from the care of the civil magistrate; for then inn-keepers, comb-makers, patten-makers, and many other trades, would be under no government, which is most necessary in such mean employments; such people are subject to bye-laws, not in respect of their occupations, but by reason of the district where they inhabit, that they may be kept in due conformity and order.

It is admitted by those who argued *on the other side*, that a custom may be good to exclude particular persons from certain privileges, but that a bye-law cannot do it. Now it will not be denied, but that there is a custom in *London*, which enables them to make bye-laws, and that their customs differ from others: now if a bye-law be founded on such a general custom, and made in pursuance thereof, it is as good as if there were an express custom for this very purpose.

(a) 1. Sid. 105.

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As to the penalty being excessive, the Court are the proper judges thereof: there are many bye-laws where the like penalty is inflicted, and those which had the least during all the reigns of *Edward the Sixth* and *Queen Elizabeth* have forty shillings and some of them five pounds, so that this is but a reasonable fine.

ROBINSON
against
GROSCOURT.

CURIA. Though the custom is, that whoever is free of the city must be free of some company, yet that custom does not oblige * a man to be of any particular company; for if it should, then though the defendant is entitled by birth to be free of such company, yet he must also be free of this, otherwise he cannot exercise this art, which is unreasonable. They may make him take his freedom (a), but cannot direct in what company; for if they had ordered the defendant to be admitted of the *Blacksmiths Company*, it had not been good. It may be a question, Whether the city has a power to enforce men of no trades to be free of those companies which are suitable to their professions? as *dancing* is no trade, but it may be called a profession. It is true, *music* is suitable to it; but it is not absolutely necessary that a *dancing-master* should be free of the *Musicians Company*: there is no fellowship of *refiners*; but the court of aldermen cannot order them to be free of the *Goldsmiths Company*, which is the most suitable to them. So that this cannot be a good bye-law, because the defendant cannot be compelled to be of that particular company, and it is sufficient if he is of any other, which he may be for any thing that appears on this return: it is in nature of a monopoly to the *Company of Musicians*, who cannot be compelled to make him free of that company in case they had refused.

* [108]

So in *Trinity Term*, in the eighth year of *William the Third*, judgment was given accordingly.

(a) See the case of *Wannell v. The City of London*, that a bye-law to oblige a joiner, in *London*, to be free of the *Joiners Company*, is good, 1. *Stra.* 675.

S. C. 8. *Mod.* 269. See also *Harrison v. Goodman*, 1. *Burr.* 12.; *Pierce v. Bartrum*, *Cowp.* 270.; *The King v. Marshall*, 2. *Term Rep.* 2.

MICHAELMAS TERM,

The Seventh of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Thomas Rokeby, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

Sir John Hawles, Knt. Solicitor General.

* *Britten against Cole.*

* [109]
Case 53.

Trinity Term, 7. Will. 3. Roll 187.

GLOUCESTER, } *JOHN BRITTEN* complains of *Thomas* *Trespass.*
to wit. } *Cole* in the custody of the marshal of the
Marshalsea of the lord the king, being before the king himself,
for that he on the twentieth day of *March*, in the seventh year of
the reign of the lord *William the Third*, now king of *England*,
&c. at *Hannam*, in the parish of *Bitten* in the county aforesaid,
with force and arms the cattle, that is to say, forty-three sheep
and two lambs of him the said *John Britten* of the price of sixteen
pounds took and drove away, and other wrongs to him did, against
the peace of the said lord the now king, to the damage of him the
said *John* of forty pounds, and thereupon he brings suit, &c.

And now here at this day, to wit, *Friday* next after three Special justifi-
weeks of the *Holy Trinity* in this same Term, until which day the cation under a
said *Thomas* had leave to imparl to the bill aforesaid, and then to *levari facias*
answer, &c. before the lord the king at *Westminster* come as grounded on an
well the said *John* by his said attorney as the said *Thomas* by *Philip* outlawry certi-
Hodges his attorney, and the said *Thomas* defends the force and fied into the
injury when, &c. and as to the coming with force and arms, and court of exche-
whatsoever is against the peace of the said lord the now king, saith quer,
that

BRITTEN
against
COLE.

* [110]

that he is *not guilty*; and of this he puts himself upon the country, and the said *John Britten* likewise: and as to the residue of the trespass aforesaid above supposed to be done, he the said *Thomas Cole* saith, that the said *John Britten* ought not to have or maintain his said action thereof against him, because he saith, that before the said time when the trespass aforesaid is above supposed to be done, to wit, on the twelfth day of *February*, in the sixth year of the reign of the said lord the now king, a certain writ of the said lord the now king of *levari facias* issued out of the court of exchequer of him the said lord the king at *Westminster*, then being in the county of *Middlesex*, directed to the sheriff of *Gloucestershire*; by which said writ, the said lord the king reciting, that whereas *Sir Richard Cocks*, Bart. then late sheriff of *Gloucestershire* aforesaid, by virtue of the writ of him the said lord the king of *capias utlagatum*, issuing out of the court of the said lord the king of common bench, at *Westminster*, against *Francis Creswick*, of *Hannam's Court*, within the parish of *Bitton*, in the county aforesaid, Esq. & outlawed in the county of *Somerset*, on the twelfth day of *June*, in the fifth year of the reign of the lord the king and of the lady *Mary* late queen of *England*, &c. at the suit of *Thomas Cole* the now defendant, and *Mary* his wife, of a plea of debt, to the aforesaid late sheriff directed, on the twenty-eighth day of *September*, in the fifth year aforesaid, took and seized into the hands of the said lord the king and lady the queen, one capital messuage or tenement called *Hannam's Court*, with all the barns, stables, out-houses, edifices, gardens, orchards and appurtenances to the same belonging; one close of pasture commonly called *Hill-house*, containing by estimation fourteen acres; one other close of pasture called the *New Enclosure*, containing by estimation eight acres, and several other grounds; all and singular which premises aforesaid, with the appurtenances, were of the clear yearly value of fifty-four pounds, in all their issues beyond reprises, of the lands and chattels of the said *Francis Creswick*, as by the transcript of the said writ of *capias utlagatum*, and the return thereof, and of a certain inquisition thereupon taken, certified into the exchequer of the said lord the now king, and there in the custody of the said lord the king remaining, more fully appears: the aforesaid lord the king willing to be answered and satisfied of the rents, issues and premises aforesaid, as is right, commanded the said sheriff of *Gloucestershire* by the said writ of *levari facias*, that he should not omit, because of any liberty, but that he should enter into the same, and should cause to be made, collected and levied, all and singular the rents, issues, and profits of the premises aforesaid, with the appurtenances, and of every parcel thereof forthcoming, from the said time of taking thereof into the hands of the said lord the king, until the feast of the Annunciation of the *Blessed Virgin Mary* then next to come (which was not thereof answered to the said lord the king), for the proportion of time, and according to the rate and yearly value above mentioned, so that when he should have levied that money, he should have the same before the barons of

of the exchequer of the said lord the king at *Westminster*, from *Easter-day* in one month then next to come in the court of the lord the king then there, to be paid to the use of him the said lord the king, and that he should have there then that writ: by virtue of which said writ of *levari facias*, *Nathaniel Rider, Esq.* then and yet being sheriff of *Gloucestershire* aforesaid, after the issuing of the same writ, to wit, on the seventh day of *March*, in the seventh year of the reign of the said lord the now king, at *Bitton* aforesaid, made his warrant in writing under the seal of the office of him the said sheriff, directed to all the bailiffs, tythingmen, * and other officers of the same county, and also to *Anthony Powell, John Cooke, John Oks, and Joseph Powell* his bailiffs; by which the said sheriff commanded the said bailiffs and other officers aforesaid, that they should cause to be made, collected and levied, all and singular the rents, issues, and profits of the premises aforesaid, in the writ aforesaid abovementioned, with the appurtenances, and of every parcel thereof forthcoming, from the said time of taking thereof into the hands of the said lord the now king, until the feast of the Annunciation of the *Blessed Virgin Mary* then next to come, for the proportion of time, and according to the rate and yearly value abovementioned, so that the said *Nathaniel Rider* the said sheriff might have the same before the barons of the exchequer of the said lord the king at *Westminster*, from *Easter-day* in one month then next to come in the court of the said lord the king then there, to be paid to the use of him the said lord the king, according to the command of the writ aforesaid. And the said *Thomas Cole* further saith, that the said capital messuage or tenement called *Hannam's Court*, the said several closes and parcels of pasture, and the rest of the premises in the writ of *levari facias* aforesaid mentioned, at the time of the issuing out of the same writ at the several times of pronouncing the said outlawry, and of issuing out the said writ of *capias utlagatum* recited in the said writ of *levari facias*, were and yet are lying and being in *Hannam* aforesaid, within the said parish of *Bitton*, in the county of *Gloucester* aforesaid; and because the said forty-three sheep and two lambs, after the issuing out of the said writ of *levari facias*, and the making of the said warrant, and before the said feast of the Annunciation of the *Blessed Virgin Mary*, to wit, at the said time when, &c. were in the said close of pasture called *Hill-house*, in *Hannam*, in the parish of *Bitton* aforesaid, being parcel of the premises aforesaid, in the said writ of *levari facias* before mentioned, there feeding *levant et couchant*, he the said *Thomas Cole* then and there requested the said *Anthony Powell* and *John Powell* to take and drive away the said forty-three sheep and two lambs, to make of the issues and profits aforesaid, according to the command of the said writ of *levari facias* to the said sheriff directed, and the warrant aforesaid made by the sheriff; whereupon the said *Anthony Powell* and *John Powell* the sheep and lambs aforesaid at the said time when, &c. at *Hannam*, in the parish of *Bitton* aforesaid, took and drove away, which are the same residue

BRITTON
against
COLE.

* [111]

Nota, The warrant was not directed to *John*, but to *Anthony*, therefore upon a motion to amend it, this was granted; for *per Curiam*, it is amendable within the statute 8. Hen. 6.

of

**Britten
against
Cole.**

of the trespass aforesaid, whereof the said *John Britten* above complains against him the said *Thomas Cole*: and this he is ready to verify. Wherefore he prays judgment if the said *John Britten* ought to have or maintain his said action thereof against him, &c.

Demurrer and joinder in demurrer.

• [112]

Case 54.

• Britten against Cole.

In trespass, A
PLEA in justifi-
cation, stating
that a *levari fa-
cias* was direct-
ed to the sheriff
on a cap. utlag.
against A. at the
suit of the defen-
dant; that there-
upon the sheriff
made a warrant
to his bailiffs to
levy the debt
due to the defen-
dant; and that
he (the defen-
dant) required
the bailiff to take
the cattle of A.
super quo the bail-
iffs did take
them, is bad;
for the trespass
is confessed, but
not avoided.

S. C. 1. Salk.
395. 408.

S. C. Comb. 434.
469.

S. C. Carth. 441.

S. C. Skin. 617.

S. C. 12. Mod.

175.

S. C. Holt, 421.

S. C. 1. Ld.

Ray. 305.

S. C. 3. Ld.

Ray. 145.

S. C. Comy. 51.

Cro. Elz. 504.

1. Saund. 211.

2. Lev. 175.

3. Bac. Abr. 352.

IN trespass for taking his cattle, the defendant pleaded *not guilty* as to the force, and made a special justification as to the residue, viz. that a *levari facias* issued out of THE EXCHEQUER, directed to the Sheriff of Gloucester, reciting, that by virtue of a *capias utlagatum* against Francis Creswick, at the suit of the defendant Cole, the said sheriff had seized into the king's hands one messuage, and several lands of the said Creswick's, being of the yearly value of fifty-four pounds beyond all charges and reprises, by which writ of *levari* the sheriff was commanded to levy the debt due to the defendant Cole out of all and singular the rents, issues, and profits of the said lands; that thereupon the sheriff made a warrant to several bailiffs to levy the profits of the said lands, &c. and the sheep and lambs being *levant et couchant* upon parcel of the lands so seized into the king's hands, the defendant required the bailiff to take and carry them away; *super quo* the bailiffs did take them, which is the residue of the trespass.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

The question was, Whether the defendant Cole has well entitled himself to command the bailiffs to execute this writ? for he cannot justify under it himself, because it is not alleged that it was prosecuted at his suit, or that the bailiffs had the warrant, or that they took the cattle *virtute warranti*, and he cannot justify it in *auxilium* of the bailiffs, because he was not present: if therefore he has not shewed a sufficient justification, the plaintiff ought to have judgment.

FIRST, Therefore it was said, that he ought to have made himself one of the bailiffs, or alleged that he acted *in aid* of them; but he has set forth, that because a warrant was directed to *them*, therefore *he* came, without their consent, or as assisting them, and commanded them to take the plaintiff's sheep; so that though there was a good warrant to the bailiffs, yet the defendant, who in this case is a stranger, had no authority to require them to take the goods of another. The writ and warrant cannot give power to any person but to him to whom it is directed, or to the party called in aid by the proper officer. As for instance, in an action of false imprisonment (a), the defendant justified by virtue of a warrant from the sheriff, directed to the bailiff who arrested the

(a) Cro. Car. 446.

plaintiff,

plaintiff, and * required the defendant to assist him to keep the other in safe custody; but here the defendant is a mere stranger to the writ, neither named in it, nor called to the assistance of that person to whom it was directed; and yet he required the bailiff to carry the cattle away.

BRITTON
against
COLL.

SECONDLY, The defendant does not *confess and avoid* as he ought to do, for he justifies the trespass without acknowledging the taking: he should have pleaded, that the writ was delivered to the officers *in forma juris exequend.* and that they took the cattle *virtute warranti*; but here he has pleaded the executing before the delivery of the writ, and sets forth, *super quo* JOHN POWELL took the sheep, when the warrant was not directed to him, but to *Anthony Powell*, so that *John* could have no authority to take them.

A justification under a writ directed to *Anthony*, *super quo John* took the cattle, is bad. 1. Saund. 18. Co. Entr. 42. 106. 667.

THIRDLY, He could not plead a writ of execution out of such a court, without shewing a judgment to warrant it, which he ought to have averred, and therefore he should have pleaded, that he sued out an original, &c. and the outlawry thereon, and then set forth the *levari facias*; for though the writ without the judgment will justify the officer in the execution of it, yet it will not justify a stranger to require him to do it (a).

In trespass, a justification under a *levari facias*, is bad, if it do not shew the judgment. 1. Sid. 125.

FOURTHLY, The most material exception was, *viz.* It is said, that the sheriff made a warrant directed to the bailiffs, and that the defendant required them to seize the cattle, *super quo* they did take and drive them away, but does not say, that they had a warrant at that time, or that they took them *virtute warranti*. Now these words, *super quo*, &c. can have no reference to the writ and warrant, but only to the request, *viz. super quo rogatu* he took them (b).

A justification under a *levari facias* is good, without stating they had the warrant at the time.

FIFTHLY, Then as to the matter in law, the question was, Whether the cattle of a stranger *levant et couchant* upon the lands of an outlawed person, may be taken and sold by virtue of the writ *levari facias*?

The cattle of a stranger *levant et couchant* on lands extended on an outlawry, may be taken for THE KING upon a *levari facias*, as the *issues and profits* of the land.

And as to that, it is necessary to consider the statute of *Westminster the Second* (c), which directs the sheriff what shall be accounted issues, *viz.* "rents, corn in the grange, and all moveables except horse-harness and household-stuff;" and my LORD COKE (d), in his comment upon this branch of that statute, explains it to be not only the rents and revenues of the land, but

8. Mod. 353. Carth. 442.

3. Bac. Abr. 757.

4. Bac. Abr. 460.

(a) It is said S. C. 1. Ld. Ray. 309. that HOLT, Chief Justice, pronounced the opinion of the Court, that this was a good exception.

(b) This exception is said not to have been allowed; for PER CURIAM, though it be the practice to say so, yet it being a plea in BAR, it shall be good to a com-

mon intent; and if the cattle were taken before the delivery of the writ, the plaintiff should have shewn it by replication; for no special matter shall be supposed to intervene to make a man a trespasser, S. C. 1. Ld. Ray. 310.

(c) C. 39.

(d) 2. Inst. 453.

BRITISH
MUSEUM
COLL.

corn in the barn, and all other moveable or personal goods whatsoever. * But this statute does not affect this case: It takes notice of several inconveniences at common law, viz. that the sheriffs did not return their writs, or if they did; it was *tard*, or they made false returns in making mandates to feigned liberties; or if a bailiff of a liberty had really the return of writs, yet he would do nothing, and that the sheriffs would frequently return too small issues, and no averment could be made against such returns. Now this statute provided a remedy against all these inconveniences, so that the whole extent of it seems to be only to process upon *originals*, and the returning of issues is only to make the party appear, and it is never carried farther than the goods of him whose appearance is required. And this seems plain by ancient authorities, for as often as any question has been made upon this statute, what are the issues which sheriffs must return, not only rents, but all the goods which the defendant had at the time of the writ purchased, have been allowed to be issues; which shews that he, and not another, must be proprietor of such goods. But let the issues be what they will, the beasts of a stranger cannot be so accounted in this case, because nothing is forfeited by the outlawry, but only the profits of his land who is outlawed; and the *levari facias* is only to make the sheriff accountable for the profits as they arise, which are rents and corn, &c. And therefore the king is not to have the occupation, and the profits of the land in such case, for if the law was so, then he might plow and sow, and cut down timber, for that is part of the profits; but this he cannot do upon such a forfeiture (a); therefore he is only entitled to the profits as they arise upon the land, which is all that is forfeited to him upon an outlawry in a personal action, and such outlawry, and the inquisition taken upon it, is to ascertain him what is forfeited; if it be a rent, then he is to have the rent; if a manor, he is to have it; but he must not plow and sow the demesne, for the land is not the debtor (b). Neither does the sheriff's return make any debt to the king, for he is to make the best of the land, and account for it, but cannot be charged with issues, as he will be where issues are returned.

Then as to the finding the value, that is not conclusive to any person, neither does it make the man debtor. If the cattle of a stranger had been on the king's land, which he had in the right of his crown as forfeited by outlawry for felony, he could not have seized them for a debt due to himself (c), * and therefore not in this case where the land is not forfeited at all, it being only an outlawry in a personal action, where he has only the pernancy of the profits to such a value, but has no title to the land. And where the king takes the profits of the land upon an outlawry in trespass, yet if the tenant or owner make a feoffment thereof to

Comb. 469.
Carth. 442.

(a) Plowd. 541. Bro. Abr. "Issue."

(b) Bro. Abr. "Return" pl. 9.
a. Roll. Abr. 808.

(c) Year Book 9. Hen. 6. pl. 12.
abridged by Brook, title "Patents" pl. 5.
and title "Outlawry" pl. 36.

another,

BRITTEN
against
COLB.

2. Will. & Ma-
7, c. 5.

another, the profits as to the king shall from thenceforth cease (a). If it should be objected, that a distress may be taken of a stranger's cattle for a debt due to the king, if they are *levant et couchant* on the land (b), that will not affect this case; for no authority can be found, that even in such case the goods so distrained might be sold, though the law is otherwise now by a late act of parliament. In trover, the defendant justified the taking the goods as bailiff to the king of his manor of *Dunstable*, upon a plaint there affirmed, and process was thereupon directed to the defendant, in that case, as bailiff, &c. by virtue whereof he distrained and sold the cattle; and it was adjudged upon a demurrer, that they could not be sold upon a *disfringas* in a court-baron (c). It is true, it has been ruled in TROVER (d), upon not-guilty pleaded, where the evidence was, that the goods were taken and sold by virtue of a commission of sewers, that such distress and sale was good; but it is not mentioned any where, that the cattle of a stranger might be taken and sold for the debt or default of another. And therefore, where a custom was alledged (e) for a lord of a manor to have the best beast which the tenant had at the time of his decease, and if such beast was esloined, then to have the like of any other man whose beasts should be *levant et couchant* upon the heriotable land; this was held a void custom, because it made the goods of a stranger forfeitable for a heriot of another. But THE YEAR BOOK OF *Henry the Seventh* (f) has this case in point: The king had the profits of a man's land by outlawry in a personal action, and the cattle of a stranger committed trespass on that land; and it was held, that though he had a sufficient interest to maintain an action of trespass, yet he could not seize the cattle. If the law should be otherwise, these inconveniences would follow:—FIRST, Upon such a seizure the subject must lose his cattle without a trial, to which he cannot be admitted against the king.—* SECONDLY, If a tenant's cattle come upon the land where the king is thus entitled to the profits, for want of mending the fences; this tenant must both answer the rent to his landlord, and forfeit his cattle to the king, which is unreasonable. But common experience shews that the law is otherwise; for whenever this writ is issued, the tenant is never altered or put out of possession; for it is no more than a charge upon the sheriff to levy so much money for the king, who can have no more forfeited to him than the outlawed person could forfeit, and that was no more than what he had in his own right; so that if the cattle of a stranger came thither wrongfully, he might have an action of trespass, but cannot have an execution at the first instance.

* [116]

THOSE WHO ARGUED on the other side answered the exceptions taken to the pleading.

(a) Year Book 21. Hen. 7. pl. 7.

(e) Dyer, 199. Bendlowes, 39.

(b) 2. Roll. Abr. 159. Cro. Eliz.

Co. Ent. 666.

431.

(c) Cro. Jac. 255. S. C. Yelv. 194.

(f) 25. Hen. 7. pl. 2. abridged by
Brooke, title "Prerogative" pl. 19.

(d) Allen, 92. Stiles, 12.

FIRST,

DEBITTER
against
Coll.

FIRST, That this being in the case of the king, and to levy a sum certain out of the rents and issues of the land, it is lawful for any person to assist the officer in the performance of his duty; and therefore it has been held a good justification, that the defendant came in *auxilium* of the officer, without saying *per mandatum* (a); for the substance of the plea is the writ to the sheriff, and the warrant to the officer.

SECONDLY, It is pleaded, that a warrant was directed to the officers, and the defendant required them to take the cattle, *super quo* they did take them, which is as well pleaded, as if he had set forth that the warrant was delivered to them: and though it was directed to *Anthony* and *Joseph Powell*, and they were required to take the sheep, &c. and it appeared they were taken by *Joseph* and *John*, who was neither named in the writ, or required to take them, it may be good enough, because the taking by *John* is void, and then there will be sufficient matter for *Joseph* to justify.

• [117]

Comb. 469.
Carth. 442.

THIRDLY, As to the matter of law, it was never yet disputed, therefore it must be presumed, that the king has a right to have the cattle; for if the sheriff should not have liberty to take a stranger's goods *levant et couchant* on the lands of an outlawed person, the *levari facias* would be of very little use. * There is no greater hardship in this case, than for a common person to seize the cattle of any person whatsoever *levant et couchant* on the land charged with rent; and it cannot be denied but such cattle are distrainable. It is true, the king shall be allowed no more than the extended value; and if more be made of it, the owner shall have it (b). This writ is to levy the issues of the land, and not of the person outlawed; and the profits being taken by the cattle of a stranger, it is reasonable the king should seize them; and this has been the course of the exchequer time out of mind. There can be no doubt of what is meant by the word "issues;" my LORD COKE (c), in his comment upon the statute of *Westminster the Second*, does not restrain them to the goods which the defendant had at the time of the writ purchased, but declares them to be all moveable and personal goods whatsoever.

Comb. 437. 470.
Skin. 617.

CURIA. If the king have a rent issuing out of land, a stranger's cattle may be distrained and sold for such rent in arrear. So likewise, where he has the pernuancy of the profits returned upon an outlawry, it is a charge upon the land itself arising *de exitibus*; and what those issues are has been sufficiently described by the statute of *Westminster the Second*; the very being on the land makes the cattle *issues* (d). Now the land being charged with an annual value to the king, where shall he have any remedy for that value, if a stranger's cattle eat the profits, and are not liable to a

(a) Skin. 619.

(b) Hardres, 106.

(c) 2. Inst. 453. See Finch L. 352.

(d) Tidd's Practice, 19. And see

10. Geo. 3. c. 50.

seizure?

Michaelmas Term, 7. Will. 3. In B. R.

seizure? And it is no new thing in the law, to punish one for the fault of another; as if there be tenant for life, remainder in fee, and the tenant for life forfeit issues and die, they shall be levied upon him in remainder, for they are to arise *de exitibus terre*. This writ itself imports that the charge is upon the land; for in other executions, the sheriff is commanded to levy the debt *de bonis et catallis*; but in this it is to levy so much *de exitibus terre*; and therefore it seems unreasonable that the king should be put to an action of trespass against the owner of such cattle which are *levant et couchant* on the lands of the outlawed person. It is true, if he had made a lease of such lands before the *exigent* returned, then the cattle could not be seized by virtue of this writ; but even in such case, he must plead that the lease was made before the outlawry; but here the outlawed * person still continues in possession, and having no cattle of his own, takes in several men's cattle to agist. The king has not the lands forfeited upon an outlawry, but the profits only; and when they are found by an inquisition to be of such a yearly value, then the lands remain a debtor to the value till the debt itself is satisfied, but he can only agist or mow those lands; therefore if he could not seize the cattle of a stranger which eat up the profits, he would have but little benefit of an outlawry. Besides, the law is, that if issues are forfeited for not appearing of jurors, the cattle of a stranger may be taken on their lands for such forfeitures, which cannot be distinguished from this case. There can be no inconveniency nor danger that the sheriff should sell the cattle thus seized, because he is to return the contract or agreement for depasturing them, and then the owners are to stand charged to pay the money to the king; but it would be inconvenient for him to punish such owners in an action of trespass, for that is a remedy which was never yet taken (a).

BRITTON
against
COLL.

* [118]

(a) The Court was unanimously of opinion, as to the matter of law, with the defendant, S. C. Comy. 51. S. C. Carth. 441; but agreed the plea to be bad, because it stated that the warrant was made to *Anthony Powell* and *Joseph Powell*, upon which *John Powell* and *Joseph Powell* took the cattle, and so

the *trespass* though not confessed is justified, for it is not a taking pursuant to the command and request. S. C. 1. Ld. Ray. 310. *Sed vide* S. C. Skin. 619. And for this defect in the pleading, judgment was entered for the plaintiff.—S. C. Carth. 443.

Herbert against Waters.

Case 55.

REPLEVIN.—The defendant, as overseer of the poor, justified the taking, by virtue of the statute 43. Eliz. c. 2. for a poor-tax; by which statute it is enacted, "That if, after issue tried for the defendant, or nonsuit of the plaintiff after appearance, the plaintiff is nonsuited, the jury may assess the damages; or if they omit so to do, the Court will grant a writ of enquiry.—S. C. 1. Salk. 205. S. C. Comb. 344. S. C. Skin. 395. S. C. 12. Mod. 85. S. C. Carth. 362. S. C. Holt, 191. S. C. 1. Ld. Ray. 59. Ante, 76, 77. 1. Sid. 380. 10. Co. 119. Comb. 11. Skin. 595.

In replevin, if the defendant justify as overseer of the poor under the 43.

HERBERT
against
WATKINS.

"ance, the defendant shall recover treble damages, to be assessed
"by the same jury, or a writ to enquire of the damages, as the
"same shall require, &c."

The plaintiff was nonsuited, and the jury had not assessed the damages.

* [119]

And now the Court was moved to award a writ of enquiry to supply that defect upon these authorities. The defendant justified under this very statute, in an action of trespass (a) brought against him; and the plaintiff being nonsuit, a writ of enquiry was awarded for the treble damages. In *replevin* (b), the like justification was made as in this case, and the plaintiff was nonsuited; and upon a writ of enquiry awarded, judgment was given for the avowant, and a writ of error brought, because the enquiry was erroneously awarded, since the statute expressly requires, that the first jury shall enquire of the damages: but that exception * was over-ruled; for though the first jury might have enquired, yet it was only an *inquest of office*, and no part of the issue (c), nor was it a thing for which an attaint would lie against them; and therefore it is within the rule taken in *Cheyney's Case* (d), that where the Court *ex officio* ought to enquire of a matter upon which no attaint lies, the omission of it may be supplied by a writ of enquiry. Besides these authorities in point, there are other cases adjudged in law which come near this, viz. Where a demurrer is joined upon the evidence, the jury are as much discharged from trying the issue, as they are upon a nonsuit; for the fact being agreed by both parties, the judgment of the Court is then demanded, Whether the matter given in evidence be sufficient to find a verdict for the plaintiff upon the issue joined (e)? Now though the jury are discharged of the issue, yet they ought to assess damages conditionally, viz. "*Si lex est cum querente quod præd. defend. est culpabilis quodq. præd. (the plaintiff) occasione præmissorum sustinuit damna, &c.*" yet if this shall be omitted (f), it may as well be done upon a writ of enquiry of damages after judgment is given upon a demurrer (g).

And for these reasons a writ of enquiry was granted in this case (h).

(a) Brampton's Case, 1. Roll. Rep. 272.

(b) Anonymous, 2. Roll. Rep. 112.

(c) 1. Sid. 380.

(d) 10. Co. 119.

(e)

(f) See *Mallory v. Jennings*, that the omission of a writ of enquiry is aided by the statute of Jeofails, Stra. 872.

(g) Cro. Car. 143.

(h) So also where an action is brought against an overseer of the poor, for any thing done in the execution of his office, and a verdict is found for him, he shall have a writ of enquiry for the treble da-

mages given to him by 43. *Eliz. c. 2.* *Valentine v. Sawcett*, 2. Stra. 1021. S. C. Cases T. H. 138.; for although the 43. *Eliz. c. 2. f. 19.* directs that the damages for the wrongful vexation shall be assessed by the same jury, yet, by Lord HARDWICKE, Chief Justice, in every case where the Court are not tied up by the statute 17. Car. 2. c. 7. which respects only *rent arrears*, a writ of enquiry may be granted to do complete justice. *Devell v. Marshall*, 2. Bl. Rep. 921. S. C. 3. Will. 442. See also *Freeman v. Lady Archer*, 2. Bl. Rep. 763. *Hallock on Costs*, 233.

Redhaw

Michaelmas Term, 7. Will. 3. In B. R.

Redshaw against Hester.

Case 56.

Trinity Term, 7. Will. 3. Roll 178.

LONDON, } **BE** it remembered, that heretofore, to wit, in A declaration in
to wit. *Easter Term*, in the seventh year of the reign of debt on bond,
the lord *William the Third, &c.* to wit: *Christopher Redshaw* and by executors of
Ann Redshaw, executors of the testament and last will of *George* the obligee a-
Redshaw, late of *Wapping* in the county of *Middlesex*, mariner, gainst the heir
deceased, complains of *William Hester*, son and heir of *William* of the obligor.
Hester deceased, lately called *William Hester*, citizen and soap-
maker of *London*, in the custody of the marshal of the *Marshalsea* of
the lord the king, being before the king himself, of a plea that he
render to them a thousand pounds of the lawful monies of *England*,
which from them he unjustly detains, for that, to wit, that
whereas the aforesaid *William Hester* the father, whose heir the
aforesaid *William Hester* the son now is, in his life-time, to wit,
on the eighth day of *March*, in the third year of the reign of the
lord *James the Second* late *King of England, &c.* at *London*, to
wit, in the parish of *Saint Mary-le-Bow*, in the ward of *Cheap*,
by his certain writing obligatory, sealed with the seal of the said
William Hester the father, and to the court of the said lord the
now king here shewn, the date whereof is the same day and year,
acknowledged himself to be held and firmly bound to the said
George Redshaw in his life-time in the aforesaid thousand pounds,
to be paid to the same *George Redshaw*, * his executors or admini-
strators, when he should be thereunto after required, and well and
truly to make the same payment the said *William Hester* the father
in his life-time bound himself and his heirs by the same writing.
Nevertheless the said *William Hester* the father in his life-time,
nor the said *William Hester* the son and heir of the said *William*
Hester the father, after the death of the said *William Hester*,
although often required, &c. the said thousand pounds to the said
George Redshaw in his life-time, or unto the aforesaid *Christopher*
and *Ann*, or either of them, hath not yet paid, nor hath either of them
paid, but to pay the same to the said *George* in his life-time, or to
the said *Christopher* and *Ann* since the death of the said *George*,
hath hitherto altogether refused; and the said *William Hester* the
son doth yet refuse to pay the same to the said *Christopher* and
Ann, and unjustly detains, to the damage of them the said *Christopher*
and *Ann* of an hundred pounds, and therefore they produce suit,
&c. And the said *Christopher* and *Ann* produce here in court the
letters testamentary of the said *George*; by which it sufficiently
appears to the court of the said lord the now king here, that
the said *Christopher* and *Ann* are executors of the said testament
of the aforesaid *George*, and thereof have the administration, &c.

* [120]

And now on this day, to wit, on *Friday* next after the morrow of *Imparlanca.*
the *Holy Trinity*, in the same Term, until which day the said *William*
Hester the son had leave to imparl to the said bill, and then to answer,
&c. comes as well the said *Christopher* and *Ann* by their attorney
I 2 aforesaid,

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REDISHAW
against
HESTER.

Plea of non est
factum, and no
lands by descent.

aforsaid, as the said *William Hester* the son by *William Turbil* his attorney. And the same *William Hester* the son defends the force and injury when, &c. and says, that he ought not to be charged with the debt aforsaid, as son and heir of the said *William Hester* his father, because he, protesting that the said writing obligatory is not the deed of him the said *William Hester* his father, for plea says, that he had not any lands or tenements by hereditary descent from the said *William Hester* his father in fee-simple, nor had on the said day of the exhibiting of the bill aforsaid, nor ever after: and this he is ready to verify. Wherefore he prays judgment if he the said *William Hester* the son ought to be charged with the debt aforsaid, by virtue of the said writing obligatory, as son and heir of the said *William Hester* his father, &c.

Replication in
lands by descent.

And the said *Christopher* and *Ann* say, that by any thing by the said *William Hester* the son above in pleading alledged, they from their action aforsaid thereupon against him had ought not to be debarred; because they say that the said *William Hester* the father, after the twenty-fifth day of *March* in the year of Our Lord one thousand six hundred and ninety-two, to wit, on the twenty-seventh day of *November* in the fifth year of the reign of the lord *William the Third*, now king of *England*, at *London* aforsaid, in the parish and ward aforsaid, died; and that the said *William Hester* the son, after the death of the said *William Hester* the father, and before the exhibiting of the bill aforsaid, * to wit, on the twenty-eighth day of *November*, in the fourth year of the reign of the lord *William the Third*, now King of *England*, &c. had divers lands and tenements by hereditary descent from the said *William Hester* his father in fee-simple wherewith he might have satisfied the debt aforsaid to the said *George Redshaw* in his life-time, and the said *Christopher* and *Ann* since the death of the said *George*, to wit, at *London* aforsaid, in the parish and ward aforsaid: and this they are ready to verify. Wherefore they pray judgment, and the said debt, together with their damages by occasion of the detention of that debt, to be adjudged to them, &c.

* [121]

Rejoinder, monies paid to the value of the lands.

And the said *William Hester* the son says, that he of the debt aforsaid, as son and heir of the aforsaid *William* his father deceased, ought not to be bound, because he says that he the aforsaid *William*, before the exhibiting the bill aforsaid, to wit, the day and place in the plea of them the said *Christopher* and *Ann* above in replying pleaded, had not lands or tenements by hereditary descent from his father aforsaid in fee-simple whereof the aforsaid *George Redshaw* in his life-time, or the said *Christopher* and *Ann* after the death of the said *George*, of the said debt might be satisfied. Because he says that well and true it is, that after the twenty-fifth day of *March*, in the year of Our Lord one thousand six hundred and ninety-two, to wit, on the twenty-seventh day of *November*, in the fourth year of the lord *William the Third*, the now King of *England*, &c. at *London* aforsaid, in the parish and ward aforsaid, the aforsaid *William Hester* his father died; and

and that he the aforesaid *William*, after the death of the said *William* his father, and before the exhibiting the bill aforesaid, to wit, the same twenty-seventh day of *November*, the year and place above said, had lands and tenements by hereditary descent from the aforesaid *William* his father in fee-simple to the value of eighty pounds and no more. But the aforesaid *William* farther says, that the aforesaid *William* his father at the time of his death, to wit, on the twenty-seventh day of *November*, the year and place abovementioned, by divers writings obligatory by which he bound himself and his heirs, was indebted for true and just debts to divers other persons than the aforesaid *George Redshaw*, to wit, to *John Lethieullier, Knight, John Nichols, Esq. Peter Balkwin*, and *Ann Peachey*, in divers sums of money amounting in the whole to eight hundred pounds of the lawful monies of *England*; and that he the aforesaid *William*, as son and heir of the said *William* his father as before-mentioned deceased, afterwards, to wit, the same twenty-seventh day of *November*, the year and place above said, the aforesaid eight hundred pounds to the said several persons aforesaid, other than the aforesaid *George Redshaw*, in discharge of their several debts aforesaid, and to the full value of all the lands and tenements which at any time before the exhibiting of the bill aforesaid he the aforesaid *William* had by hereditary descent in fee-simple from his father * aforesaid, paid and caused to be paid: and this he is ready to verify. Wherefore he prays judgment if he the said *William Hester* the son, of the debt aforesaid, by virtue of the said writing obligatory, as son and heir of the aforesaid *William* his father, ought to be charged, &c.

Redshaw
against
HESTER.

* [122]

And the said *Christopher* and *Ann* say, that the plea of him the said *William Hester* the son, in manner and form as aforesaid, above in pleading rejoined, and the matter in the same contained, are not sufficient in law to bar them the said *Christopher* and *Ann* from having their said action thereof against him the said *William Hester* the son, and that they the same *Christopher* and *Ann* have no necessity, nor are they bound by the law of the land in any other manner to answer: and this they are ready to verify. Wherefore for defect of sufficient rejoinder in this behalf the said *Christopher* and *Ann*, as before, pray judgment, and their said debt, together with their damages by the occasion of the detention of that debt, to be adjudged to them, &c. And for causes of demurrer in law upon the plea aforesaid above in pleading rejoined, the said *Christopher* and *Ann*, according to the form of the statute in such cases thereof lately made and provided, shew and demonstrate to the Court here the causes following, to wit, because the aforesaid *William Hester* the son, in the aforesaid rejoinder, has not shewn or demonstrated what tenements or lands he had by hereditary descent from the aforesaid *William* his father in fee-simple; and for that because the plea aforesaid above in pleading rejoined is uncertain, repugnant, and wants form, &c.

Causes of demurrer.

Joinder in demurrer.

Case 57.

Redshaw against Hester.

In debt on bond
against an heir,
it the defendant
plead "*riens per*
"*descend*;"

A REPLICATION
that he had lands
and tenements
by descent before
the exhibiting of
the bill, *unde præd.*
de debito præd.
satisfecisse potuit,
&c. concluding
with a veri-
fication, is good
within the sta-
tute 3. & 4.
Will. & Mary,
c. 14.

• [123]

S. C. Comb.

344.

S. C. Carth.

353.

S. C. 3. Salk.

379.

1. Sid. 248. 342.

1. Lev. 130.

224.

5. Com. Dig.

"Pleader"

(2. E. 4.).

3. Bac. Abr. 28.

DEBT UPON BOND against an heir, who pleaded "*riens per*
"*descend*."

The plaintiff replied, that he had lands and tenements by descent before the exhibiting the bill, *unde præd.* (the plaintiff) *de debito præd. satisfecisse potuit*; and then puts himself upon the judgment of the Court.

And upon demurrer, exception was taken to this replication, FIRST, because it was double, for he ought to have concluded to the country.

SECONDLY, The replication is neither good at common law, or by the new statute 3. & 4. Will. & Mary, c. 14.—It is not good at common law, for the plaintiff does not shew that the defendant had lands by descent at the time of the bill filed. The value of the land was not material before this statute; for if an heir was sued for a thousand pounds, and pleaded *riens per descend*, and it was found that but one acre came to him by descent, the judgment must be, "that the aforesaid * plaintiff recover his debt aforesaid;" so that he should be charged to pay the whole debt, though nothing should be put in execution but that single acre. But now the statute 3. & 4. Will. & Mary, c. 14. has made the quantum of the land material; for it provides, "that the heir may plead *riens per descend* at the time of the bill filed, and that the plaintiff may reply, that he had lands and tenements from his father before the original writ brought; and if upon issue joined it be found for the plaintiff, the jury shall enquire of the value of the land descended; and if sold before the action brought, execution shall be taken out against the heir to the value of the land so sold by him, as if it had been his proper debt." Now this replication is not agreeable to the statute, because the plaintiff has made the value of the land part of his plea; for he says, that the defendant has such lands, *unde debitum præd. satisfecisse potuit*; and puts himself upon the judgment of the Court. But the replication directed by the statute is, that the defendant had lands and tenements by descent before the original writ brought; which should have been tried by a jury, who upon finding the land descended, are *ex officio* to enquire into the value. The plaintiff has alledged, that the lands thus descended were to the value of the debt; now if the jury should find that they were not half of that value, this would falsify his plea; and yet if such pleading should be allowed, he would recover even upon a plea that was false, for the new statute provides, that he shall recover to the value of the land sold.

E contra. The inconveniences which were at common law, and which are now remedied by this statute, are as follow:—

FIRST, In point of time; for if the heir had aliened before process issued against him, this plea of "*riens per descend*" had been good, and the plaintiff could not have recovered his debt. But this is

now

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now prevented; for if the heir sell any lands which by law were liable to the debt of his ancestors before any action brought against him, yet he shall be answerable to the value of the land so sold.—SECONDLY, If before the action brought he had sold all the lands descended to him except one acre, and upon *riens per discent* * pleaded, it had been found that such acre descended, though the judgment was *quod recuperet debitum*, yet, at common law, he could only extend that acre; but now he shall have execution to the value of the land sold; so that though his plea may be falsified by the finding of the jury, yet the plaintiff shall now recover *pro tanto*; and so the replication is good, both by the common law and the statute (a).

REDSHAW
against
HIST. R.

* [124]

(a) THE COURT, upon debate, held that the replication was good, and as it ought to be; and that if the *unde debito predicto satisfecisse potuit* had been left out, it might have been a good cause of objection; for the statute does not give occasion to alter any more of the form of the replication common in such cases, but only as to the time concerning the assets by discent; and that the conclusion, which before the statute was to the country, must now be with an averment, because

the defendants may have an opportunity to answer the new matter alledged in the replication, S. C. Carth. 354. And thereupon judgment was given for the plaintiff, S. C. Comb. 345.1 for though a jury may find, that what descended to the heir is not sufficient to satisfy the debt, and so satisfy the value alledged in the replication, yet THE PLAINTIFF shall recover to the value of the land sold, be it what it will. S. C. 3. Salk. 180.

Fletcher against Ingram.

Case 58.

Michaelmas Term, 7. Will. 3. Roll 107.

STAFFORDSHIRE, } JOSEPH INGRAM and John Hale were Replevin.
to wit. } summoned to answer to James Fletcher
of a plea, wherefore they took one mare of him the said James, and unjustly detained her, against gages and pledges, &c. And whereupon the said James by John Lilly his attorney complains, that the aforesaid Joseph and John on the twentieth day of February in the seventh year of the reign of the lord William the Third, now King of England, &c. at Shewston in the county aforesaid, in a certain place there called the Lane, took the mare aforesaid of him the said James, and unjustly detained her, against gages and pledges until, &c. and whereupon the said James saith that he is injured, and hath damage to the value of twenty pounds, and thereupon he brings suit, &c.

And the aforesaid Joseph and John Hale by Thomas Callow their attorney come and defend the force and injury when, &c. and as bailiffs of Rowland Fryth, Gent. well acknowledge the taking of the mare aforesaid, in the place in which, &c. and justly, &c. because they say, that the same place in which the taking of the mare aforesaid is supposed to be done, containeth, and at the said time when the same taking of the mare is supposed to be done, did contain in itself one acre of land with the appurtenances, in Shewston aforesaid; which said town of Shewston is, and from the

Defendants
make cogni-
zance as bailiffs
of the lord of
the manor.

Michaelmas Term, 7. Will. 3. In B. R.

FLETCHER
against
INGRAM.

Prescription to
hold a court-
leet.

Prescription for
the homage to
choose a constable,

who is to take
the office and an
oath for the due
execution of it,
under a penalty
to be imposed by
the homage.

That the plain-
tiff was chosen
constable by the
homage.

said time when, &c. and also from time whereof the memory of man is not to the contrary, was within the manor of *Shewston*, with the appurtenances, in the county of *Stafford* aforesaid, of which said manor, with the appurtenances, the aforesaid *Rowland* is, and at the said time when, &c. and long before, was seised in his demesne as of fee; and the said *Rowland*, and all those whose estate he hath in the same manor, with the appurtenances, from time whereof the memory of man is not to the contrary, have had, and been accustomed to have, a court-leet or view of frankpledge of the same manor, and whatsoever belongeth to the view of frankpledge, of all the inhabitants and residents within that manor, before his steward of the same court for the time being, in every year within the month next after the feast of *Saint Michael the Archangel*, to be holden at that manor yearly, as to the said manor, with the appurtenances belonging: and they the said *Joseph* and *John* further say, that within the manor aforesaid there is had, and from time whereof the memory of man is not to the contrary there hath been had a certain custom, that the jurors charged and sworn to enquire of and present those things which belong to the court-leet and view of frankpledge aforesaid, at the court of view of frankpledge of the manor aforesaid, holden at that manor within the month next after the feast of *Saint Michael the Archangel* yearly, have chosen, and for all the time aforesaid have been accustomed to choose one fit man of the inhabitants within the manor aforesaid, to be constable of the constablewick of *Shewston* aforesaid, to serve in that office for one year, which said man so chosen took upon himself that office, and for all the time aforesaid was used and accustomed to take it, and hath taken and been accustomed to take an oath for the due execution of that office, under a reasonable pain, for the time aforesaid, by the jurors aforesaid at such court-leet and view of frankpledge in that behalf imposed. And the said *Joseph* and *John* further say, that the aforesaid *Rowland* being lord of the manor aforesaid, with the appurtenances, and being seised of the same in form aforesaid, at the court-leet or view of frankpledge of that manor holden at the said manor within the month next after the feast of *Saint Michael the Archangel*, to wit, on the ninth day of *October* in the fifth year of the reign of the lord *William the Third* the now king, and of the lady *Mary*, late queen of *England*, &c. before *Henry Fryth, Gent.* then steward of that court of him the said *Rowland*, the aforesaid *James Fletcher* then and long before being an inhabitant within the manor aforesaid, to wit, at *Shewston* aforesaid, and being a fit man to be constable of the aforesaid constablewick of *Shewston* aforesaid, by *Edward Thornewton, Thomas Grace, John Cooke, Joseph Alsop, James Standley, William Milner, William Ridding, Michael Wiat, Thomas Salt, James Milner, John Sitvester, John Aicoock* and *John Dickeson*, honest and lawful men and inhabitants within the manor aforesaid, and then and there in the same court sworn and charged to inquire and present those things which to the court-leet and view of frankpledge did belong,

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in due manner and according to the custom aforesaid, was chosen to be constable of the constablewick of *Shrewston* aforesaid, to serve in that office for one year then next following: and the said jurors then and there in the same court did order that the said *James* should make his oath for the due execution of his office aforesaid, under the pain of forfeiting forty shillings, whereof the aforesaid *James Fletcher* immediately afterward, to wit, the same day and year had notice, yet the said *James* hath not made his oath for the due execution of the office of constable aforesaid, nor hath executed or taken upon himself that office, but he to do those things then, and often afterwards, there, absolutely refused, by which afterwards and before the time when, &c. to wit, at the court-leet, or view of frankpledge of the manor aforesaid of the said *Rowland* at that manor, within the month next after the feast of Saint *Michael the Archangel*, to wit, on the eleventh day of *October* in the sixth year of the reign of the said lord the king and lady *Mary*, late queen of *England*, holden before the said *Henry Frith*, then steward of him the said *Rowland* of that court, by *Edward Thornteton*, &c. honest and lawful men, then inhabitants within the manor aforesaid, then and there in the same court sworn and charged to inquire and present those things which to the court-leet or view of frankpledge aforesaid did belong, it was presented, that the aforesaid *James Fletcher*, for that he was duly chosen constable of the constablewick of *Shrewston* aforesaid, at the last leet holden for the manor aforesaid, and under the pain of forty shillings upon him imposed, he was ordered to take upon himself and execute that office, and to make his oath in form aforesaid, for the due execution of the said office, which things, or any thing thereof, he hath not done, therefore he hath forfeited to the lord of the manor aforesaid the said forty shillings, for the pain aforesaid, then to be paid to the lord of the manor aforesaid, as by the record thereof in the power of the said steward of the court of the manor of him the said *Rowland* aforesaid at that manor remaining, more fully appears: and because the said forty shillings for the pain aforesaid to him the said *Rowland*, being lord of the manor aforesaid, as before is set forth, at the said time when, &c. was in arrear, and not paid, they the said *Joseph* and *John*, as bailiffs of him the said *Rowland*, well acknowledge the taking of the mare aforesaid in the said place in which, &c. and justly, &c. for the said forty shillings, for the pain or amercement aforesaid so being in arrear, and not paid to the said *Rowland*, and within the manor aforesaid, &c.

And the aforesaid *James* saith, that by any thing by the aforesaid *Joseph* and *John* above in the cognizance aforesaid in pleading alledged, they the said *Joseph* and *John* ought not to acknowledge the taking of the mare aforesaid in the said place, &c. to be just; because he saith, that the plea aforesaid by them the said *Joseph* and *John* in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in law for the acknowledging the taking of the mare aforesaid in the said place in which,

FLETCHER
against
INGRAM.

That the plaintiff hath refused to take on him the office, and the oath.

Plaintiff is fined
forty shillings.

For payment of
which defendants took the
mare.

Demurrer to the
cognizance.

FLETCHER
against
INGRAM.

which, &c. to be just, and that he, to that cognizance in manner and form above made and pleaded, hath no necessity, nor is he bound by the law of the land to answer; and this he is ready to verify: wherefore, for want of a sufficient plea in this behalf, he the said *James* prays judgment, and his damages by occasion of the taking and unjustly detaining of the mare aforesaid, to be adjudged to him, &c.

Joinder in demurrer.

And the aforesaid *Joseph* and *John* say, that the plea aforesaid by them the said *Joseph* and *John* in manner and form aforesaid above pleaded, and the matter in the same contained, are good and sufficient in law for them the said *Joseph* and *John* to acknowledge the taking of the said mare in the said place in which, &c. to be just; which said plea, and the matter in the same contained, they the said *Joseph* and *John* are ready to verify and prove, as the Court, &c. And because the said *James* to that cognizance hath not pleaded or answered, nor the same hath hitherto in any manner denied, they the said *Joseph* and *John* pray judgment, and a return of the mare aforesaid, together with their damages, costs, and charges, according to the form of the statute in such case made and provided, to be adjudged to them, &c. And because the court of the said lord the king now here is not yet advised of the giving of their judgment of and upon the premises, day is thereupon given to the parties aforesaid, before the lord the king, from the day of ————— wheresoever, &c. to hear their judgment of and upon the premises aforesaid, for that the court of the said lord the king now here are not yet advised, &c.

*Curia advisare
vult.*

Case 59.

Fletcher against Ingram.

2^a. Whether the lord of a leet can, without stating a prescription, distrain for an amercement.

S. C. 1. Salk. 175.

S. C. Comb. 350.

S. C. Holt, 187.

S. C. Skin. 635.

S. C. 12. Mod. 87.

S. C. Lilly Ent. 369.

S. C. 1. Ld. Ray. 69.

S. C. 3. Ld. Ray. 117.

1. Salk. 175.

320.

Ante, 96.

2. Roll. Rep. 3.

ch. 10. f. 32.

IN REPLEVIN for taking a mare at *Shewston*, in a certain place called *the Lane*. The defendants made cognizance as bailiffs of one *Rawland Fryth*, lord of the manor of *Shewston*, whereof he was seised in fee, &c.: then they alledge a prescription to hold A COURT-LEET there within a month after *Michaelmas* every year; and they set forth a custom within the said manor, to elect A CONSTABLE at the said leet out of the inhabitants there; which person so elected has used to take upon him that office, under a reasonable penalty in that behalf, to be imposed by the jury; that the plaintiff at a court-leet held for the said manor, was elected CONSTABLE by the jury; that he was ordered to take upon him the execution of that office, under the penalty of forty shillings, which he neglected to do; that this neglect was presented at the next court, by which the plaintiff had forfeited forty shillings to the lord of the said manor; for which the distress was taken, &c. The plaintiff demurred to the cognizance, and the defendants joined in demurrer.

The exceptions taken to the cognizance were,

8. Co. 33. b. 4. Com. Dig. 696. 1. Bac. Abr. 439. 2. Hawk. P. C.

FIRST,

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FIRST, That the defendants have not prescribed to any right in the lord of the leet to distrain for an *amercement*, being a private benefit to him, and which he cannot have without a prescription to the distress (a).

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against
INGRAM.

* TO THIS OBJECTION it was answered, It is true, this is an *amercement*, which differs from a *fine*, the first being always imposed by the jury, and the other by the Court; and though it is a thing of less nature than a fine, yet a distress may be taken for it, without a custom alledged so to do: and this is the resolution in *Grieffly's Case*.

* [128]

SECONDLY, The jury ordered him to take his oath generally, to execute the office of constable; but do not say that he was *summoned* to appear before a justice of peace for that purpose; or before *whom* or *where* he should come to take his oath.

AS TO THIS SECOND OBJECTION it was said, that the defendants have alledged a custom every year to choose a fit person at the court-leet to be constable for that year, and that the plaintiff was elected constable, which is a sufficient obligation for him, under a pain, to come and take upon him the office; and it is also alledged that he had notice, so that the custom of the place operates upon him, which he is bound to obey. Now the administering the oath is subsequent to the custom, and he is thereby bound to do all reasonable acts to qualify himself to take the said office upon him; though usually the steward certifies under his hand what person is chosen, which certificate is carried to a justice of the peace; and if the party refuse to take upon him the office, the justice usually sends his warrant to compel him.

If a leet jury order a constable elect to take the oath of office, he must be *summoned*, and directed *where* and *when* to take the oath.

8. Co. 38. b. 41.
11. Co. 43. 44.
Cart. 28.
Pal. 7.
Cro. Eliz. 241.
581.
1. Roll. Rep.
1. Salk. 175.

201. 2. Roll. Rep. 3. Cro. Jac. 382. Fitzg. 46. 108. 192. 3. Mod. 300.
4. Com. Dig. "Leet" (M. 8.).

THIRDLY, They do not say that the *forty shillings* imposed on him for not taking upon him the office, was a reasonable pain.

AS TO THE THIRD OBJECTION, The law ought to judge, whether the penalty imposed on him be reasonable or not; and the averring it to be reasonable, will be of little use if the Court should be of another opinion.

Under a custom to impose a reasonable fine, if the party impose *forty shillings*, Co. Lit. 208.

Quare, If a justification is good without averring that that sum was reasonable.

In *Hilary Term* following, this case was argued again.

AND IT WAS OBJECTED, that it was an unreasonable custom, and therefore void.

FIRST, For the uncertainty of the time when the year shall begin, in which the plaintiff is to take upon him this office; and so like the case where the condition of a feoffment in fee is for payment of a sum of money, and no time limited for the payment, there the obligor hath time during his life to do it; and this being a custom against common law, it must be taken strictly.

(a) 11. Co. 44. Cro. Eliz. 673.

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Skin. 248.
Comb. 43. 118.

* To which it was answered, that the time was certain enough, for the plaintiff was to hold the office *pro uno anno integro prox. sequent.* that day whereon the Court was held. But it is as certain, as where a custom hath been alledged for a copyholder to pay a year's value of the land upon an admittance; and yet such a custom hath been held good, because the value may be reduced to a certainty (a). So where a custom was, that the surrenderee shall come and be admitted after three proclamations, otherwise that the copyhold should be forfeited, and the surrenderee died, and his heir within age refused to be admitted; it was held, that the lord might seize *quousque* the infant came of age, which is as uncertain as this, for the heir may die before that time (b). So where a man is beyond sea, it is uncertain when he may return, and yet his right is saved by that means (c).

An avowry for an *Amerciament* for not taking the oath of constable, must shew before whom the oath was ordered to be taken, and the court leet was held.

SECONDLY, It is said, that the homage ordered him to take an oath duly to execute the office, but does not appoint *before whom* he should take it, or from whom he should accept it; and so not like *Grieffy's Case* (d), for there the custom was laid to choose a constable within a month after *Michaelmas*, to hold the office for one year next following, and that if the person was present in court, that he ought to be sworn by the steward; so that not only the time, but the person before whom the oath should be taken is ascertained, which is wholly omitted in this case.

3. Brownl. 198.

This objection was thus answered, *viz.* That it is true, where a man is obliged to do an act, it must appear to the Court that it is possible for him to do it, but that the Court will take notice without setting it forth; that a steward of a leet during the time he held the court may give an oath to a constable, as well as a justice of peace after the court is adjourned.

An avowry for an *ameriament* in a COURT-LEET, for not accepting the office of constable, must shew that the party had special notice of his election to the office.

THIRDLY, It does not appear that the plaintiff was summoned to THE LEET, or that he had any *special notice* that he was chosen constable; but only generally, that *notitiam habuit*, which is not sufficient; and for this reason an indictment was quashed in this court (e), which set forth, that the defendant was fit to be a constable; that he was *debito modo electus*; and that he had notice of it, but did not take the oath, &c. and because it was not said that he was summoned before a justice of peace for that purpose, the indictment was quashed.

* [130]

S. C. Salk. 175.
Hob. 129.
Cro. Eliz. 885.
3. Leon. 8.
1. Show. 61.
1. Salk. 107.

* To which it was answered, that by alledging *notitiam habuit*, it must be intended due and legal notice, because the law requires him to take the oath before the steward of the leet, or a justice of the peace. In *Prigg's Case* (f), who was indicted, for that he being chosen headborough, refused to take the oath to execute

(a) Perkins v. Titus, 3. Mod. 132.

S. C. 3. Lev. 255. S. C. 2. Show.

507.

(b) Rex v. Dilliston, 3. Mod. 221.

And see 9. Geo. 1. c. 29. f. 5.

(c) Cro. Jac. 226.

(d) 8. Co. 38.

(e) Rex v. Harper, Trinity Term

7. Will. 3.

(f) Allen, 78.

that

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that office, there is no mention of *notice* or *summons* before whom to appear for that purpose; but a writ was granted by the court of king's bench, directed to him, commanding him to go before a justice of the peace to take it. Besides, it is alledged in this cognizance, that the plaintiff *statim postea ibidem notitiam habuit*; which word *ibidem* is a relative, as well in a legal as grammatical construction, and must refer to the Court, being the place where he was chosen constable.

FLETCHER
against
INGRAM.

FOURTHLY, It was objected, that there was not a custom alledged to make any distress for this penalty; and though it may be true that a man may distrain for an *amercement*, and for a *fine* in a leet, without alledging a custom, yet for such an extraordinary thing as this, there must be a custom expressly laid to distrain, &c.

Q^u. Whether a justification for distraining for an amercement be good, without a custom to make such distress.

Thus where a custom (*a*) was alledged to swear twelve men to enquire into the articles given in charge at a court-leet, and that the men so sworn had used, *inter alia*, to present themselves to pay to the lord of the leet ten shillings *pro certa letæ*, for which the avowant distrained; but it was held unlawful, because it being for the particular benefit of the lord, and against common right, he cannot justify the taking a distress without a prescription, as he may for a fine or amercement.

2. Inst. 118.
8. Co. 41.
Cro. Jac. 382.
Kit. 43.
Cro. Eliz. 698.
3. Mod. 138.

This objection was answered by the Counsel, that a *distress* is incident, as well for a *penalty*, as for a *fine* or an *amercement*.

CURIA. The steward may impose a fine upon a person who is elected by the homage, if he be present at the leet, and refuse to be sworn to execute the office; but if the person be not present, the steward cannot fine him, but he may be amerced (*b*), which must be presented at the next court, and affirmed; and after the court is over, the justices of peace may administer the oath of constable by the power which they have as conservators of the peace, which power they had at common law, and is now vested in them, and the rather because a constable is but a subordinate officer to them for the preservation of the peace. * But the party ought to be *summoned*, and a *time* and *place* ought to be appointed under a penalty *when* and *where* he shall come, and before whom to take the oath; and therefore *notitiam habuit* generally is not enough, for though he be an inhabitant, yet he may be esoined.

If a constable refuse the oath, being *present*, he may be fined for contempt; if *absent*, presented by the homage at the next court, and amerced.

8. Co. 39.
* [131]
11. Co. 43.
1. Roll. Rep. 73.
Savil, 94.
1. Bac. Abr. 440.
2. Bac. Abr. 505.
2. Hawk. P. C. ch. 10. f. 35.
4. Com. Dig. "Leet" (M. 8.).
Winch. Ent. 987.

And therefore for want of alledging *special notice*, judgment was given for the plaintiff.

(a) Godfrey's Case, 11. Co. 43. 440. 2. Bac. Abr. 505. 518. Stra. 847. Fitzg. 109. 1. Will. 248.
(b) 1. Roll. Rep. 73. 8. Co. 39. 11. Co. 43. 1. Loc. 89. Cro. Eliz. Andrews, 47.
241. Kitchen, 43. a. 1. Bac. Abr.

A plea, which, though informal, is in substance a *DE-MURDER*, is good.

S. C. Post. 144.
S. C. 12. Mod. 133.

Ante, 4, 5. 7.
Post. 146. 175.
Post. 334.
4. Bac. Abr. 130.
1. Com. Dig. 90.

THE plaintiff declared, that in consideration he had paid to the defendant sixteen guineas, he promised to pay the plaintiff a hundred pounds; if no town in *Flanders* garrisoned with two thousand men should be taken or surrendered to THE FRENCH KING before the first day of September 1695; and lays an *indebitatus assumpsit* for the hundred pounds upon a wager, and another *indebitatus* for the hundred pounds received by the defendant for the use of the plaintiff.

To which the defendant pleads thus: "*Et modo ad hunc diem scilicet diem Veneris prox. post crast. Sanctæ Trinitatis isto eodem termino usque quem diem præd. ISAACUS BERNARD (solvis sibi omnibus et omnimodis exception. quoad billam præd.) habuit licentiam ad billam interloquendi et tunc ad responden. &c. coram dom. rege apud Westm. ven. tam præd. JOHANNES LEAVES, per attorn. suum præd. quam præd. ISAACUS per JOHANNEM BERNARD attorn. suum et idem ISAACUS defen. vim et injur. quando, &c. et petit judicium de narratione præd. quia quoad primam promissionem et assumptionem. superius in narratione illa mentionat. idem ISAACUS dicit quod præd. JOHANNES LEAVES valorem præd. sexdecim peciarum auri cuneat. per ipsum JOHANNEM LEAVES eidem ISAACO ut præfertur solv. supposit. in narratione sua præd. in certo monstrare et allegare per legem terræ tenetur et debuisset unde ex quo præd. JOHANNES LEAVES verum valorem sexdecim peciarum auri cuneat. illius superius non monstravit seu allegavit idem ISAACUS petit judicium de narratione præd. quoad primam promissionem et assumptionem. præd. et quod narratio illa in ea parte cassetur, &c. Et: quoad secundum promissionem et assumptionem præd. superius in narratione ipsius JOHANNIS LEAVES mentionat. idem ISAACUS similiter petit judicium de narratione illa quia præd. JOHANNES LEAVES in narratione sua præd. non ostendit de vel pro quibus pignoribus in eadem promissione et assumptionem. superius express. fact. fuisset inter eosdem JOHANNEM LEAVES aut ISAACUM, aut qualiter vel in quo modo præd. JOHANNES LEAVES pignus ill. de eodem ISAACO * lucrasset prout per legem terræ ostendere debuisset ita quod curia dom. regis hic appareat utrum pignus præd. licitum seu illicitum fuisset unde ex quo præd. JOHANNES LEAVES ill. curiæ dom. regis hic non ostendit seu demonstravit idem ISAACUS petit judicium de narratione præd. quoad præd. secundum promissionem. et assumptionem. et quod narratio ill. in ea parte cassetur, &c. Et quoad tertiam promissionem et assumptionem præd. superius in narratione ipsius JOHANNIS LEAVES mentionat. idem ISAACUS similiter petit judicium de narratione præd. quia dicit quod centum libræ in eadem tertia promissione et assumptione superius express. sunt eadem centum libræ in secunda promissione et assumptione præd. superius in narratione ipsius JOHANNIS LEAVES similiter mentionat.*"

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"tionat. et express. et non al. neque diversæ et hoc parat. est ver-
 "rificare unde ex quo præd. JOHANNES LEAVES un. et eandem
 "denariorum summam in una et eadem actione bis petiit idem
 "ISAACUS similiter petit judicium de narratione præd. quoad ter-
 "tiam promission. et assumption. et quod narr. in ea parte similiter
 "cassetur, &c.

LEAVES
 against
 BERNARD.

IT WAS OBJECTED against this form of pleading, that it is nei-
 ther a demurrer nor a plea in bar; and therefore it must be a plea
 in abatement, and so no judgment final could be given, but a res-
 pondeas ouster.

Conclusion of
 the plea.

Vide Post. 146.
 6. Mod. 102.
 1. Lut. 42.

FIRST, It cannot be a demurrer, for that is where the party
 will go no farther, because the other has not shewed sufficient
 matter against him; and therefore he says, that *narratio minus est*
sufficien. in lege to make him give any answer thereunto, where-
 upon he prays the judgment of the Court if he shall be compelled
 to answer: all which form is wanting in this plea.

SECONDLY, It cannot be a plea in bar to the action, for then
 he should have pleaded, that the plaintiff *actionem suam* against the
 defendant *habere non debet*; and concluded his plea thus, "*Unde*
petit judicium si præd. (the plaintiff) *actionem suam præd. inde*
versus (the defendant) *habere seu manutenere debeat, &c.*"

1. Com. Dig.
 "Abatement"
 (I. 12.).

THIRDLY, Therefore it must be in abatement, and that is either
 to the writ or count: if the action is brought by original, then
 the plea is *petit judicium de brevi*, and it must conclude in the same
 words; if it is to the declaration, then it must be *petit judicium de*
billa et narratione, for *billa* and *narratio* are the same, and in this
 form the defendant has now pleaded. * The first time that such
 uncertainty of pleading was introduced, was in the twenty-second
 year of Charles the Second, where the defendant began his plea in
 bar, "*actio non, &c.*" and concluded in abatement, "*Unde pro*
defectu sufficientis narrationis, &c. petit judicium." But all the
 other entries are otherwise.

4. Bac. Abr. 50.
 10. Mod. 111.

* [133]
 2. Saund. 128.

BUT THE COURT was of opinion, that the substantial part of a
 demurrer was in this plea, and therefore the defendant had judg-
 ment.

Smith against Sharp.

Case 61.

WRIT OF ERROR upon a judgment by default in an action of
 covenant upon articles, &c. wherein the defendant cove-
 nanted, that he or his heirs would convey six acres of land, &c.
 to the plaintiff or his assigns; and farther covenanted, that he
 would offer to the plaintiff a good conveyance for the assuring the
 said six acres to him or his assigns.

On a covenant
 that the defen-
 dant or his heirs
 shall convey
 an acre to the
 plaintiff or to his
 assigns; A
 BREACH that he

had not conveyed it to the plaintiff, is good, without adding *or to his assigns*.—S. C. 1. Salk. 139.
 S. C. 12. Mod. 86. Post. 352. 1. Vent. 114. 1. Mod. 67. 223. 1. Stra. 199. 3. Mod. 238.
 1. Bac. Abr. 547. 2. H. Bl. Rep. Trinity Term, 1793.

The

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SMITH
against
SMART.

The breach assigned was, that he had not executed a conveyance to the plaintiff himself, and takes no notice of his assigns.

It was for this reason objected, that the breach was not well assigned, for if it had been conveyed to his assigns, the covenant had been performed. As for instance; A covenant was made by the plaintiff, that he, his executors, or assigns, would repair, &c. (a); the breach was, that neither he, his executors and assigns, had repaired; and upon demurrer it was held to be ill, because he ought to have assigned the breach in the *disjunctive* according to the covenant.

In the principal case, the declaration was held good, for there is a difference where a thing is to be done by a person, or his assigns, and to a person or his assigns: for in the first case the breach must be assigned, that it was not done "either by the one or the other"; but in the last case it will be intended *prima facie*, to be done to the person himself; but if he assign his interest, then it may be done to the assignee.

Whereupon judgment was given for the plaintiff.

(a) Colt v. How, Cro. Eliz. 348.

Case 62.

Tayler against Baker.

* [134] STAFF. } *MEMORAN.* quod alias scilicet termino Pas-
ult. præterit. coram dom. rege apud Westm. ve-
nit HENRICUS TAYLER per NATHAN. HICKMAN. attorn. suum
et protulit hic in curia dict. dom. regis tunc ibidem quandam billam
suam versus JOHANNEM BAKER in custod. mar. &c. de placito
transgressionis super casum: et sunt pleg. de prof. scilicet JOHANNES
DOE et RICHARDUS ROE quæ quidem billa sequitur in hæc verba,

STAFF. ff. HENRICUS TAYLER queritur de JOHANNES BA-
KER in custod. mar. Marefc. domini regis coram ipso rege existen.
pro eo videlicet quod cum præd. HENRICUS 21 die Maii anno regni
dom. Willi. tertii nunc regis et dom. Mariæ nuper reginæ Angliæ
sexto; apud SWINFORD REGIS in consid. quod idem HENRICUS
servus ipsius JOHANNIS fuisse et ipse in labore aurigæ ac in labo-
ribus et operibus agriculturæ et agricolæ pro spatio octodecim mensium
ante idem tempus bene et fideliter servisset ipse idem JOHANNES super
se assumpsit et eidem HENRICO adtunc et ibidem fideliter promisit
quod ipse idem JOHANNES tant. denariorum summas quant. idem
HENRICUS pro laboribus et servitiis suis tempore perform. eorundem
habere mereretur eidem HENRICO cum inde postea requisit. esset bene et
fideliter solvere et contentare vellet et idem HENRICUS in facto dicit
quod ipse pro laboribus et servitio suis sicut præfertur per ipsum pro
eodem JOHANNES factis habere meruit sex libras legalis monetæ An-
gliæ unde idem JOHANNES postea apud SWINFORD REGIS præd.
notitiam habuit, cumque etiam præd. JOHANNES vicesimo octavo
die Maii anno sexto supradicto apud SWINFORD REGIS præd. infi-
mul

nil computasset cum præfat. HENRICO de diversis aliis denar. sum-
mis eidem HENRICO per præfat. JOHANNEM ante idem tempus
debit, et adtunc in arctro, et insolut. existen. pro diversis aliis operibus
et negotiis per ipsum HENRICUM pro eodem JOHANNI ante tempus
illud performat. et super compo. ill. præd. JOHANNES invent. fuit
in areragiis erga eundem HENRICUM in al. summa quinque libra-
rum bonæ et legalis monete Angliæ, et præd. JOHANNES in conside-
ratione inde super se assumpsit; et eidem HENRICO, adtunc et ibidem,
fideliter promisit, quod ipse idem JOHANNES præd. quinque libras
eidem HENRICO cum inde postea requisit. esset bene et fideliter sol-
vere et contentare vellet; quæ quidem summa in toto se attingunt ad
undecim libras præd. tamen JOHANNES separah. promissio. et assump-
tiones suas præd. minime curan. sed machinan. et fraudulentè in-
tenden. eundem HENRICUM in hac parte callide et subdole decipere
et defraudare præd. separah. denar. summas seu aliquem inde denar.
eidem HENRICO non solvit, nec aliquammodo pro eisdem contentavit, licet
ad hoc facien. præd. JOHANNES postea, scilicet, primo die Februarii
anno sexto supradicto, apud SWINFORD REGIS præd. in com. præd.
et sæpius postea requisit. fuit; sed ill. ei hucusque solvere seu aliqua-
liter pro eisdem contentare omnino recusavit, et * adhuc recusat, ad
damnum ipsius HENRICI viginti librarum; et inde producit fecit,
Ec.

* [135]

Et modo ad hunc diem, scilicet diem Veneris prox. post crastinum
Sanctæ Trinitatis isto eodem Terminio, usque quem diem præd. JOHAN-
NES habuit licentiam ad billam præd. interloquen. et tunc ad respon-
dend. Ec. coram dom. rege apud Westm. ven. tam præd. HENRICUS
per attorn. suum præd. quam præd. JOHANNES per RICHARDUM
LONGFORD attorn. suum; et idem JOHANNES defen. vim et in-
juriam quando, Ec. et dicit, quod præd. HENRICUS actionem suam
præd. inde versus eum habere seu manutenere non debet, quia dicit,
quod post confessionem præd. separah. promission. et assumption. in narr.
præd. mentionat. scilicet eodem 21 die Maii anno regni dictorum
dom. regis et dom. reginæ sexto, apud SWINFORD REGIS præd.
concordat. fuit inter præd. HENRICUM et eundem JOHAN. quod
præd. HENRICUS acceptaret et dicit. JOHANNES daret eidem HEN-
RICO quandam billam sub manu sua ipsius JOHANNIS pro solutione
summe quinque librarum eidem HENRICO, ad festum Sancti Mich.
Archang. tunc prox. sequen. in plena satisfactione et exoneratione
omnium denariorum summarum eidem HENRICO a præfat. JOHANNI
debit. et superinde ipse præd. JOHANNES, adtunc et ibidem, dedit eidem
HENRICO quandam billam sub manu ipsius JOHANNIS, et per eadem
billam cognovit se debere et stare indebitat. eidem HENRICO summam
gl. solven. eidem HENRICO ad festum Sancti Mich. Archang. tunc
prox. sequen. ad quam quidem solutionem bene et fideliter faciend.
idem JOHANNES obligavit se, et hæredes suos, per eandem billam;
quam quidem billam ipse præd. HENRICUS adtunc et ibidem cepit et
acceptavit, in plena satisfactione et exoneratione præd. separah. pro-
mission. et assumption. ipsius JOHANNIS in narratione præd. mentionat.
et hoc parat. est verificare: unde petit judicium si præd. HENRICUS
actionem

TAYLER
against
Baker.

actionem suam præd. inde versus eum habere seu manutenere debeat, &c.

*Et præd. HENRICUS dicit, quod ipse per aliqua per præd. JOHANNEM superius placitan. allegat. ob actione sua præd. inde versus eum habent. præcludi non debet, quia, protestando quod non concordat. fuit inter præd. HENRICUM et JOHANNEM quod præd. HENRICUS acceptaret et dicit. JOHANNES daret eidem HENRICO billam in placito præd. mentionat. sub manu ipsius JOHANNIS pro solutione summæ quinq. librarum eidem HENRICO ad festum in eodem placito specificat. in plena satisfactione et exoneratione omnium denariorum sum. eidem HENRICO à præfat. JOHANNNE debet; protestando etiam, similiter quod præd. HENRICUS non cepit et acceptavit billam præd. in plena satisfactione separat. promission. et assumption. ipsius JOHANNIS in placito præd. similiter mentionat. prout præd. JOHANNES superius inde placitando allegavit, pro placito eidem HENRICUS dicit, quod præd. JOHANNES * non dedit præfat. HENRICO aliquam billam sub manu et sigillo ipsius JOHANNIS pro solutione denariorum in placito præd. mentionat. Et hoc paratus est verificare: unde petit judicium, et damna sua, occasione non perform. promission. et assumption. præd. sibi adjudicari, &c.*

* [136]

Demurrer, and joinder in demurrer.

Case 63.

Tayler against Baker.

To *assumpsit*; if the defendant plead an agreement to take a bill in satisfaction; A REPLICATION *protestando* there was no such agreement made, or bill given, and pleading that it was not under SEAL, is good.

QUANTUM MERUIT for work and labour, and an *infirmal* computasset for five pounds, to pay *eum inde requisit. esset.*

The defendant pleaded, that it was agreed between him and the plaintiff, that the defendant should give, and the plaintiff should accept a bill of five pounds, in satisfaction of what was due to him, and that he did accept such a bill according to the said agreement.

The plaintiff replied, *protestando* that he made no such agreement; *protestando etiam*, that there was no such bill given; *pro placito dicit*, that it was under seal (a).

And upon demurrer to this replication, it was held good.

Ante, 86. Co. Lit. 124. Plowd. 276. Cowp. 128.

(a) See 5. Com. Dig. "Pleader" (N.) (2. G. 10).

Case 64.

Bowers and his Wife against Cook, Executrix, &c.

In debt on bond against the defendant, as executor. A plea that the obligor died intestate, and that administration was committed to the defendant, &c. is good, without traversing his having intermeddled as executor.—S. C. Post. 145. S. C. 1. Salk. 298. S. C. Carth. 363. S. C. 12. Mod. 83. S. C. Holt, 307. 556. Cro. Eliz. 108. 565. 810. 3. Leon. 197. 8. Mod. 301. Carth. 99. Chan. Cases, 33. 1. Sid. 76. 5. Co. 30.

DEBT against the defendant as executrix, &c. She pleaded, that her husband died intestate, and that the Archbishop of Canterbury committed administration to her; *cujus prætextu* the

said

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said defendant administered to the goods and chattels of *John Cook* her husband; *unde petit judicium*, &c. (a). And upon demurrer to this plea,

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AND HIS WIFE
against
COOK,
EXECUTRIX, &c

The question was, Whether she should not have *traversed*, that she was executrix, or ever administered as executrix?

If the plaintiff in this case had replied, that she administered *de son tort*, and the defendant had demurred, judgment should be given against him, because, by the demurrer, it is confessed that she was a wrongful administrator, and therefore by her intermeddling with the goods, an advantage is given to the creditor to sue her, either as executrix or *administratrix*, though in truth she was neither at that time; but administration was committed to her afterwards. Now a wrongful administration shall never be intended, unless the party acknowledge the intermeddling with the estate. * It is true, in the case of *Bradbury v. Reynell* (b), the defendant's plea went a little farther: That was an action of debt brought against an executor; he confessed, that some of the intestate's goods came to his hands, and that afterwards administration was committed to another, to whom he delivered the said goods; now in such case he may be sued as EXECUTOR *de son tort*, because he had once charged himself to the plaintiff's action, and therefore shall not be discharged by matter *ex post facto* (c). The like exception was taken to the like plea in the common pleas (d), and judgment was given for the plaintiff; not because the plea was ill, nor for the reason now alledged, but because it was a plea in *abatement*, and concluded *in bar*.

* [137]

Vide 1. Cro. 89.
3. Cro. 102.
406. 565.
Moor, 419.
1. Mod. 50.
213, &c.,

Afterwards IT WAS ADJUDGED in the principal case, that the plea was good, and that the defendant need not traverse that she was executrix, or ever administered as executrix.

- (a) Moor, 30. 1. Bac. Abr. 15. Rep. 97. ; Edwards v. Harben, 2.
(b) Cro. Car 565. Godd. 95. 100. Term Rep. 597.
(c) See Paget v. Pilest, 2. Term (d) 1. Mod. 213.

The King against Stocker.

Case 65.

THE defendant was indicted for forging a bill of lading; and upon demurrer to the indictment,

The exception was, viz. It set forth, that the defendant *scienter et subtiliter, nequiter et falso, fecit et fabricavit, vel fieri et fabricari causavit, quandam chartam, VIDELICET, quandam billam exonerationis, cujus tenor sequitur*, &c. which is too uncertain, for this being an indictment at common law, it ought to have more certainty; and though the defendant has demurred, yet nothing is thereby confessed but what is well pleaded: besides, these are distinct offences, and require several judgments.

An indictment in the *disjunctive* for "making" and forging, "or causing to be made and forged," a bill of lading, &c. is bad, for uncertainty.

S. C. 1. Salk. 342. 371.
8. Mod. 329.

- Post. 414. Ld. Ray. 737. Stra. 747. 900. 3. Bac. Abr. 101. B. R. H. 370. 1. Hawk. P. C. ch. 70. f. 11. 2. Hawk. P. C. ch. 25. f. 52. f. 74. Fitzg. 56. 2. Hale, 349.

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against
STOCKER.

To which it was answered, that the word "*vel*" is only an explanation of what goes before, and makes it signify the same thing. As for instance: the statute 5. *Eliz. c. 4.* enacts, "That it shall not be lawful to exercise a trade except he shall be apprentice seven years, under the penalty of forty shillings *per month*;" and a man was indicted on this statute, for that he did exercise *artem sive mysterium, &c.* and this was held good.

* [138]

CURIA. An indictment setting forth, that the defendant *murdravit, vel murdrari causavit*, is not good; for those are distinct crimes, *viz.* one is the proper act of the party, and the other is not. So in this case, the defendant might be absent when the forgery was committed; and if so, it requires a distinct consideration in respect of the fine. It is true, in a strict sense, he who causes a forgery to be done, is a forger himself; but then it ought to be so laid in the indictment. If in an action of battery the plaintiff should declare, that the defendant *verberavit vel verberari causavit*, the causing him to be beaten will not make him guilty of the battery, for it is no more than a trespass. In an indictment, or information, the fact is never laid in the *disjunctive* (a); and therefore an indictment on the statute 8. *Hen. 6. c. 9.* for a forcible entry into "two closes of meadow, or pasture," was held void (b) for the uncertainty (c).

1. Hawk. P. C.
c. 64. l. 37.

(a) Co. Ent. 278.

(b) 2. Roll. Abr. 81.

(c) The Court thought the indict-

ment not good, being in the disjunctive;
S. C. 1. Salk. 371.; and therefore it was
quashed. S. C. 1. Salk. 341.

Case 66.

The King against Gately.

Record of an
order of sessions
on the statute
5. *Eliz. c. 4.*
discharging an
apprentice from
his master, be-
cause he had not
taught him the
trade of a sur-
geon, pursuant
to the covenant
in the indenture.

MIDDLESEX, } BE it remembered, that at the general ses-
sion of the peace of the lord the king
to wit. holden for the county of *Middlesex* by adjournment at *Hicks's Hall*,
in *St. John's Street*, in the county aforesaid, on *Friday*, to wit,
the eleventh day of *October*, in the seventh year of the reign of
our sovereign lord *William the Third*, by the grace of God now
king of *England, &c.* before *German Ireland, Esq. Jacob Mun-
day, Esq. William Underhill, Esq. William Withers, Esq.* and
others their fellows, justices of the said lord the king, assigned to
keep the peace, and also to hear and determine divers felonies,
trepasses, and other misdemeanors committed in the same county,
it was ordered, by the court aforesaid, as follows, that is to say,
"WHEREAS *James Cardow, Esq.* one of his majesty's justices
of the peace for this county of *Middlesex*, upon complaint made
"by *Edward Green*, apprentice to *Roger Gately*, now of the
"parish of *St. James Clerkenwell*, in the said county, and late of
"London, surgeon, by indenture of apprenticeship, bearing date
"on or about the twenty-second day of *November*, in the year of
"Our Lord 1690, for the term of seven years, from the date of
"the said indenture, to learn the said art; that the said *Gately*
"had not taught and instructed * him the said *Green* in the art,
"mystery, or profession of a surgeon, according to the covenants
"in

* [139]

Michaelmas Term, 7. Will. 3. In B. R.

" in the said indenture of apprenticeship, but had altogether compelled him the said *Green* to be a *rope-dancer, tumbler*, and *jack-pudding*; and the said *James Cardrow*, upon examination of the said matter, for want of good conformity in the said master, could not compound and agree the same; and therefore by recognizance taken before him the ninth day of *September* last, did bind the said *Gately* with sureties to appear at this present quarter-sessions to answer the said complaint: now upon examination of the said apprentice, upon oath, and other proof, it appears to this Court, that the said *Roger Gately* has not taught and instructed the said *Green*, or caused him to be taught and instructed in the art, mystery, or profession of a *surgeon* during the time of his apprenticeship, but instead thereof has altogether compelled him to practise the art and employment of *rope-dancing, tumbling*, and acting as a *jack-pudding*, on a mountebank's stage, and in booths, in fairs and markets; and that the said *Gately* also had at several times immoderately beat and misused his said apprentice: and for that it could not be made appear to this Court, that the said *Gately* did either understand, practise, or exercise the said art, mystery, or profession of a *surgeon*, and upon a full hearing of what was insisted on by Counsel on either side, this Court, upon consideration of the said matter, doth think fit, and order, that the said *Edward Green* shall be, and he is hereby discharged from his said indenture of apprenticeship to the said *Roger Gately*; and the justices of the peace for this county, whose hands and seals are hereunto set (*quorum unus, &c.*) have declared, and do declare, that for the reasons aforesaid, they have discharged, and do discharge the said *Edward Green* from his said indenture of apprenticeship to the said *Roger Gately* accordingly."

THE KING
against
GATELY.

The King against Gately.

Case 67.

THE order above-mentioned being removed into the court of king's bench by a *certiorari*, several exceptions were taken to quash it.

FIRST, The order is, that the servant shall be discharged from his master; but the master is not discharged from his covenants to the servant; therefore the order, being not mutual, is void,

* To which it was answered, that it is not necessary it should be mutual, for when the servant is discharged, the other is no longer a master.

S. C. Comb. 353. S. C. Carth. 198. 366. S. C. Sett. & Rem. 131. 1. Mod. 287. 3. Bac. Abr. 550.

SECONDLY, The statute 5. *Eliz. c. 4.* never intended to give the justices in sessions a general power to meddle with masters in all trades, but only in such which were then used in *England*, and *apprentice* from his master, if not bound to one of the trades mentioned in the statute.—S. C. Salk. 471. 1. Mod. 2. 286. 1. Vent. 175. 1. Saund. 315. Comb. 353. *Sed Quære*, and see note (q) page 144.

An order of session to discharge an apprentice from his master, virtually discharges the master from the covenants of the indenture.

* [140]
S. C. 2. Salk. 471.

The session under the 5. *Eliz. c. 4.* cannot discharge an apprentice from his master, if not bound to one of the trades mentioned in the statute.—S. C. Salk. 471. 1. Mod. 2. 286. 1. Vent. 175. 1. Saund. 315. Comb. 353. *Sed Quære*, and see note (q) page 144.

Michaelmas Term, 7. Will. 3. In B. R.

THE KING
against
GATELY.

therein particularly mentioned; and it provides, "That if such
"master," which must be in one of those trades, "shall misuse
"his apprentice, then the justices may interpose:" but a *surgeon*
is not named in that act; and it being a penal law, it shall not be
extended according to equity to comprehend any other trade but
what is expressly named in the act.

This objection was thus answered, *viz.* that a *surgeon* is a trade
within the statute, for it is a manual occupation, and that is par-
ticularly mentioned in the act. But it has been held, that this
statute extends to more trades than those mentioned in it; for the
apprentice of a *merchant* has been discharged from his master by
an order of sessions, and yet a *merchant* is not named in that act.
Besides, it is not a penal but a remedial law, to regulate masters
and apprentices (a).

The justices of
the peace may
discharge an ap-
prentice but not
an *articled ser-*
vant.

1. Salk. 67, 68.
2. Salk. 471.
490. 491.
Carth. 156.

THIRDLY, The justices of peace have no authority to discharge
an apprentice, but where he was compelled by them to serve; and
in such case it is reasonable, that the contracts which were made
by their authority should be dissolved by the same power; but they
cannot discharge any voluntary agreements made between the
parties. If they make an order for the payment of servants wages,
it is good, because they have power to compel the service (b);
but for the wages of a *coachman*, or the like, they have no power
to make an order, because they cannot compel a man to serve in
that capacity (c). One *Reycroft*, a justice of peace in *Middlesex*,
made an order for the payment of a *seaman's wages*, and upon an
action brought against him, the plaintiff recovered thirty pounds
damages (d).

Qu. Whether
in an order
of justices, dis-
charging an
apprentice, it
must appear that
they were pre-
sent at the ses-
sions.

• [141]
2. Keble. 822.
Skin. 98.
Carth. 198. 366.

FOURTHLY, But if the justices of peace had any power, they
have not pursued it, for it does not appear, that they who set their
hands and seals to the discharge were present in sessions; and at
the examination of the matter, it being only set forth in the or-
der, "That the justices of the peace of the county, whose * hands
"and seals are thereunto set, &c." and those may be justices act-
ing out of sessions.

Afterwards it being moved again, this order was quashed for the
second and *third* exceptions taken to it.

(a) See *Rex v. Collingburne*, Mich.
Term, 12. Geo. 1. where on an order of
session to discharge an apprentice from
the trade of a *glazier*, it was contended
that the session had no authority, because
this is a trade not mentioned in the act;
but the Court said, that although it was
doubted whether the statute 5. *Eliz. c. 4.*

extended to all trades, it had of late been
settled and agreed that it does. 1. *Salk.*
663. S. C. 2. *Ld. Ray.* 1410.

(b) *Rex v. Pope*, Post. 419.

(c) 2. *Jones* 47. *Comb.* 3. 6. *Mol.*
91. 204. 3. *Salk.* 261.

(d) 27. *Viner Abr.* 408. pl. 15.

Michaelmas Term, 7. Will. 3. In B. R.

Stedman against Page.

Cafe 68.

REPLEVIN. The plaintiff declared for taking bricks, &c. The defendant made cognizance as bailiff of one *John Bennet*, and *Grace* his wife; setting forth, that one *Simon Bennet* was seised in fee of the lands *in quo*, &c. and, being so seised, made a lease thereof to *Griffith* for forty-four years, rendering rent; that *Simon Bennet* died, and the lands descended to his daughters and coheiresses, one whereof married the said *John Bennet*, and the other was the present *Countess of Salisbury*, and so made cognizance for a moiety of the rent.

Co-parceners must avow jointly.
S. C. 1. Salk. 390.
S. C. Comb. 347.
S. C. 12. Mod. 86.
S. C. 1. Ld. Ray. 64.
Carth. 364.
1. Salk. 187.
Ld. Ray. 726.
422.
Co. Lit. 164. 169. 196. 180. 1. Bac. Abr. 444. Cowp. 219.

And upon demurrer, JUDGMENT was given for the plaintiff, because one coparcener cannot make such an avowry for a moiety of the rent before partition, though they have several inheritances.

The King against Hill.

Cafe 69.

SHOWER. Though the statute of recusancy 3. Jac. c. 4. l. 17. says, "That an outlawry for recusancy shall not be reversed for want of form;" yet in *Serjeant Trinder's Wife's Case* (a), you adjudged in this court that it should, that the statute may be made sense: an indictment or information for recusancy shall not be quashed for form; but on traverse of the fact, and bail given, the outlawry shall be reversed for form.

Outlawry for recusancy may be reversed for want of form.
S. C. 1. Salk. 371.
Cro. Car. 504.
1. Show. 309.
3. Keb. 592.
Skin. 114.

Quod Curia concessit.

1. Hawk. P. C. ch. 10. l. 29.

(a) 1. Will. & Mary,

Anonymous.

Cafe 70.

HOLT, Chief Justice. On the reversal of an outlawry, in an information for sending children beyond sea to be bred papists, the defendants must plead *instante*; *et sic per* ASTRY.

Pleading in outlawry on the 1. Jac. 1. c. 4. l. 6.

* The King against Betterton and Others.

* [142]
Cafe 71.

A PROHIBITORY writ (a) was issued out to the new players, *Betterton* and others, who had erected a PLAY-HOUSE in *Little-Lincoln's-Inn-Fields*. The writ recited, that it was a nuisance to the neighbourhood, and therefore prohibited them to continue it; but the players not obeying this writ, there was a rule made for an attachment, *nisi*, &c.

Quare, Whether the Court of King's Bench can grant a prohibitory writ to suppress it, or it must be left to the common mode of prosecution by indictment.—S. C. Skin. 625. S. C. Holt, 538. 2. Rush. Coll. 220. 247. 1. Roll. Rep. 109. 1. Mod. 76. 2. Keb. 846. 3. Keb. 464. 3. Bac. Abr. 684. 1. Hawk. P. C. c. 75. l. 7.

If a licensed playhouse, from the great concourse of persons resorting to it, become a public nuisance,

(a) See the writ verbatim, Skin, 626.

THE KING
against
BETTERTON
AND OTHERS.

SHOWER came and shewed, that no such writ could be granted by the Court, for that the parties had no way to defend themselves, unless it were to come in and be examined upon interrogatories upon oath, and they would swear it was no nuisance, as appeared by several affidavits (which he then shewed); but he said, that the most proper method would be to proceed by indictment; and then THE GRAND JURY, viz. the whole county, would consider whether it were a nuisance or not.

HOLT, Chief Justice. You are not concluded by this writ, as to the right; but you may come in and plead to this attachment the general issue, and if the thing be no nuisance, it is no fault or contempt to continue it. It is like the case of A PROHIBITION to the ecclesiastical court; you make a suggestion that the defendant proceeded there *contra prohibitionem regiam*, upon which, if there goes an attachment, the defendant may come and take issue, that he did not proceed after the prohibition granted. There was a case in this court of *Jacob Hall (a)*, where the Court sent such a writ as this is here, and made him pull down his stage. But indeed, that of a *rope-dancer* is a nuisance *in se*, but here it is only so in consequence; for the acting of plays, you say, is only a nuisance, as it draws the people, and coaches, and sharpers thither.

SHOWER. The law will not determine a man's right but by a jury. The writ *de leproso amovendo (b)* is a writ of an extraordinary nature, and I think has not been granted these hundred years; but even in that writ, the sheriff is commanded to enquire by the oath of twelve men. * But besides, in this particular case, the prosecution is carried on by the patentees of the old play-house, and not by the inhabitants; which shews that they do not think it a nuisance, if it be one: and in truth, the question at last will be, Whether those letters patents, to have the sole liberty of setting up a play-house be not merely a licence and authority which determined by the king's death, and so does not bind his successor? and the new players are licensed by his present majesty.

HOLT, Chief Justice. It is a case of consequence, and therefore we will take time to consider of it.

EYRE, Justice. I think the most proper way is to proceed by indictment.

Adjournatur.

(a) 1. Mod. 76.

(b) Fitz. N. B. 8th edit. p. 534.

Case 72.

Davis against Speed.

The original in a writ of annuity is the same as in debt, and therefore in a bill, *in placito debiti*, the plaintiff may declare on a deed for an annuity.—S. C. Carth. 262 354. Post. 335. Cro. Eliz. 3. 268. Yelv. 208. 9. Mod. 243. Cro. Car. 171. Skinner. 66. 1. Com Dig. "Annuity" (E.). Fitzg. 85.

SKINNER. This is debt on a deed for an annuity, and the action is laid in the county palatine of Chester. To which the defendant demurs.

FIRST,

Michaelmas Term, 7. Will. 3. In B. R.

FIRST, Because this Court has not jurisdiction,

DAVES
against
SPED.

SECONDLY, The bill is for *debt*, and the declaration is for an *annuity*, which is a material variance, for they shall receive different judgments. In the case of *Lucas v. Fullwood (a)*, the plaintiff entered his suit in *placito debiti*, and declared that the defendant *reddat ei 50l. de annuali redditu quas ei debet et injuste detinet*; and, on *nil debet*, the plaintiff had a verdict, but it was adjudged, *quer. nil capiat per billam*; for by his declaration he demands an *annuity*, which is contrary to the entry of his plaint in *placito debiti*. If the declaration be, *per quod substraxit annualem redditum*, he shall, in a writ of *annuity*, have a several and distinct judgment; for in a writ of *annuity* he shall have judgment of the arrears hanging the writ; but in *debt* he shall only have judgment for the sum demanded.

THIRDLY, No action of debt lies for an annuity for life.

HOLT, Chief Justice. No; nor on an annuity for years (b).

CHESHIRE, à contra. But this is all annuity; the bill and declaration are the same in annuity.

* HOLT, Chief Justice. They are so.

* [144]

Then as to the jurisdiction; I do not know what became of *Jennings and Hawkins' Case*; there was a plea to the jurisdiction, in which there was another point adjudged, that when the defendant pleads to the jurisdiction, he must also plead that he lives in the county palatine, or that he has lands there whereby he may be summoned, though the cause of action be laid in the county palatine, and it is not well pleaded without it, because process cannot issue against the defendant in the county palatine. So that though the cause of action here arises in the county palatine, yet since that is not pleadable to our jurisdiction, that is not material.

Then annuity lies, though the annuity continues, to recover the annuity and arrears; but for the future there must be a *scire facias* on the judgment.

JUDGMENT for the plaintiff.

(a) Yelv. 108.

Eliz. 263. *Brendlop v. Philips, Cro.*

(b) See *Lucas v. Fulwood, 1. Bulst.*

Eliz. 895. *contra*. But see the case of *Acherley v. Vernon, Fortesc. 188.*

Churchy against Roffe.

Case 73.

HOLT, Chief Justice. If a defendant be arrested, and in execution, and one become bound for him to the plaintiff, and the defendant give the person who becomes bound judgment for his counter-security, it is good, though no attorney were present: and his bond to the creditor, is good, though no attorney was present.—S. C. Holt, 398. 1. Mod. 1. 6. Mod. 85. 163. 1. Salk. 402. Cowp. 141. 281. 5. Com. Dig. "Pleader" (V. 2.). Str. 530. 902. 1245. 3. Burr. 1792. 1. Bac. Abr. 188. Cowp. 141. 281. 4. Term Rep. 433.

A bond and judgment given by a debtor to a third person, to secure him from

it

Michaelmas Term, 7. Will. 3. In B. R.

CHURCHY
against
ROSSE.

it is not within the common rule of the court, because it was not given to the plaintiff himself (in which case there must be an attorney present), but not when given to a third person.

Case 74.

Lee against Barnes.

Where a man may plead in abatement of the declaration, or not.

S. C. Holt, 3. Fitzg. 256.

HOLT, Chief Justice. You may plead in abatement of a declaration where the action is by *original*, for the pleas there are different; but if the action is by *bill*, you cannot plead in abatement of the declaration, but only of the *bill*, for they are the same thing, and therefore the entry in such case is *petit judicium de billâ*.

* [145]

Case 75.

* Bowyer against Cook.

The several ways of modern pleading, where one is sued as executor and where as administrator.

S. C. Ante, 136.

S. C. 1. Salk.

298.

S. C. Carth. 363.

S. C. 12. Mod.

83.

S. C. Holt, 307.

556.

110b. 79. Lutw. 30. 890. 2. Vent. 180. 5. Com. Dig. "Pleader" (2. D. 4.).

In debt against the defendant as executrix, A PLEA that she is administratrix, concluding *quod respondere non debet*, is bad.

S. C. Carth.

561.

2. Saund. 97. 190. 337. N. Lutw. 144. 4. Bac. Abr. 35.

S. C. Ante, 136.

S. C. 1. Salk.

298.

Fitzg. 37.

Skin. 86.

HOLT, Chief Justice. In an action against an executor, the old way was to plead, *ne unque executor ne unque administrator* as executors. But this is a dangerous way, and it is the better way to plead, as this case was, "he is not executor, but that the bishop has granted administration to him," and that proves him not to be executor. In the case of *Lathbury v. Humfrey* (a) it is said, there should be a *traverse*; but all the precedents and the reason of the thing is to the contrary. If the defendant be sued as administrator, and he plead that there is a will, and that he is made executor, there ought to be a *traverse*, *ABSQUE HOC* that the testator died intestate: but where he is sued as executor, and he pleads that he died intestate, there needs no *traverse*.

SHOWER. Then the conclusion, *quod respondere non debet ad billam*, is good, because the plaintiff names us *executrix*, and not *administratrix*, and either this or *quod cassetur billa* is good, 3. Bullf. 250. Debt by executor, and a *profert*, &c. the defendant pleaded, that the party which was dead, died intestate, and that letters of administration were granted to him, *ABSQUE HOC* that the plaintiff is executor; and by the Court the *traverse* is not good, and day was given to put him to a peremptory plea.

HOLT, Chief Justice. You should have begun the plea, *petit judicium de billâ* (b): but if there had been a *traverse*, the plea had been naught; as if he had said, *ABSQUE HOC* that he made her executrix.

DEE. But my exception is, that he ought to have traversed, that he had not administered as executor before administration granted, for we have liberty to charge him as *EXECUTOR de sen*

(a) *Lathbury* and his Wife, Administratrix of William Bridges, v. M. Humfrey, Yelv. 115.

(b) Ante, 132. 144. Moor, 30.

1. Com. Dig. "Abatement" (I. 12.).

1. Bac. Abr. "Abatement" (M.). Pickering v. Symonds, Fost. 334.

Michaelmas Term, 7. Will. 3. In B. R.

tort as a rightful one. The case of *Justice v. Whyte* (a) is express on the point: In debt against the defendant, as executor of *J. Whyte*, the defendant pleads, *J. Whyte* made a will, but made not him executor, &c. and concluded in bar; and this was held a plea in abatement only.

BOWYER
against
COOK.

At another day this case was again debated.

SHOWER. No traverse is necessary here, for a wrongful administrator shall not be intended, but it is to come on their side in their replication. We have shewn, that the plaintiff has mislaid his action by charging us as executor, and also we have shewed * him how to mend it, that we are not *executor*, but *administrator*, which are the only two things requisite in pleas of abatement, and must be done: so if the defendant plead to the jurisdiction of the court, it will be bad, unless he shew some other court where the plaintiff may sue him. Then the *respondere debet* is only form, and you are to give judgment according to the nature of the case, and we have shewed it abateable, and therefore you will abate it.

S. C. Ante, 136.
S. C. 1. Salk.
298.
Fitz. 37.
Skin. 86.
* [146]

HOLT, *Chief Justice*. No; every plea must have its proper conclusion: you should have pleaded in abatement, but *respondere non debet* is proper to the jurisdiction, which, it is true, is in consequence in abatement; but they are two distinct things, and you must begin and conclude the plea properly, and put it to the judgment of the Court. When a man pleads to the jurisdiction of the Court, *respondere non debet* is a good plea; sometimes it is *si Curia cognoscere velit*, &c.

Every plea must
have its proper
conclusion.

Ante, 132, 133.
1. Saund. 283.
2. Saund. 97.
189, 190. 339.
N. Lutw. 44.
Show. 4.

1. Lutw. 303. 306. Cowp. 575. 2. Term Rep. 439.

But as to the other exception, there ought not to be a *traverse*, and the plea is much better without it; for he allows that he is chargeable as to the right, but that it is in another manner than you have charged him, and shews that it is as administrator, which is enough, and is a full answer to the declaration: and it is a foreign intendment that he administered wrongfully. Why should he traverse ABSQUE HOC that he administered as EXECUTOR *de son tort*? That is a special matter not charged against him: he need not traverse administration as executor before, when you only charge him generally in the declaration; but you ought to reply, and shew what act of administration he had done: at common law an administrator was only suable as executor: we cannot suppose a *tort*, unless it is alledged. But I think the defendant ought to answer over for the other fault.

Traverse.
Ante, 136.

Skin. 274.

Respondent ouster.

(a) 1. Mod. 239.

HILARY

MEMORANDUM FOR THE RECORD

On the 1st day of January, 1900, the following was received from the Secretary of the Board of Education, New York City:

The Board of Education has the honor to acknowledge the receipt of your letter of the 29th inst. in relation to the proposed amendment to the Charter of the Board of Education, and to inform you that the same has been referred to the Committee on the Charter, for their consideration.

The Committee on the Charter has the honor to inform you that they have held several public hearings on the proposed amendment, and have received many suggestions from the public. They have also held several private hearings on the same, and have received many suggestions from the members of the Board of Education.

The Committee on the Charter has the honor to inform you that they have prepared a report on the proposed amendment, and have recommended that the same be adopted, with certain amendments.

The Board of Education has the honor to inform you that they have adopted the report of the Committee on the Charter, and have recommended that the proposed amendment be adopted, with certain amendments.

The Board of Education has the honor to inform you that they have adopted the report of the Committee on the Charter, and have recommended that the proposed amendment be adopted, with certain amendments.

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WILLIAM

HILARY TERM,

The Seventh of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Thomas Rokeby, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

• [147]

• *Sir William Wentworth against Lord Strafford.*

Case 76.

THE late *Earl of Strafford*, in the year 1676, gave a warrant of attorney to confess a judgment at the suit of the plaintiff, and this was given to one *Symson*, an attorney in the country, and sent to one *Wall*, who was his entering clerk, and the judgment was entered accordingly, *quod recuperet debitum et damna sua*, and a blank left to insert what the sum should be for the damages. *Wall* died soon afterwards, and the warrant of attorney and his papers were all lost; but *Symson*, who was still living, made affidavit of the fact.

A motion was now made for leave to put in a sum certain for the damages and costs, which was opposed for these reasons:

FIRST, Because there was nothing appeared to direct what the amendment should be, as a declaration, which may be amended by a writ, or one roll by another, &c.

SECONDLY, If any such thing had appeared in this case, yet this could not be amended, because it was of another Term, this judgment being now nineteen years old; and though this should be admitted to be the act of the Court, and so amendable if in the same Term wherein the judgment was entered, yet, being now so many years past, it cannot be done.

THIRDLY,

Qu. Whether, if judgment be entered on a warrant of attorney, and a blank left to insert the quantum of damages, the Court, after a lapse of nineteen years, will suffer the judgment to be amended.

S. C. 1. Ld.

Ray. 68.

1. Salk. 52.

Ray. 39. 398.

1. Sid. 70.

1. Mod. 316.

3. Mod. 112.

5. Mod. 148.

6. Mod. 263.

2. Lev. 22.

2. Saund. 289.

Stra. 1110.

Burr. 1986.

2730.

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against
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STRAFFORD.

3. Lev. 430.
6. Mod. 164.
269.
4. Saund. 249.
Skin. 591.

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Comb. 433.
Skin. 253.

Comb. 71.
Carth. 520.

2. Mod. 316,
317.
Yelv. 130.
Ray. 32, 39.
398.
2. Mod. 112.
2. Lev. 22.
2. Saund. 289.
1. Sid. 70.
Comb. 86. 265.

Comb. 393.

THIRDLY, Neither can it be amended if it should be taken to be the misprision of the clerk; for at common law such a misprision in process was not amendable in another Term; and it is not warranted by the statute 8. Hen. 6. c. 12. which extends to records as well as to process, and likewise to pleas, warrants of attorney, original and judicial writs, panels and returns, in all which the negligence of the clerk is to be examined, reformed, and amended, in affirmance of the judgment.

THOSE WHO ARGUED for the amendment insisted, that the Court might put in any sum to make the judgment perfect, though it was uncertain what sum they should allow for costs, because it does not appear what was confessed, since the warrant of attorney was lost; and this may be done especially since it appears to be the neglect of the clerk to enter the judgment before the costs were taxed. The words omitted are the act of the Court, who had power, at common law, to amend their own judgments before any statute of amendments was made, though in another Term; as for instance, in the Year Book (a), a *præcipe quod reddat* was brought, and the defendants were effoined to *tres Mich.* which was adjourned to *crastino Purificationis*, when it should have been to *octab. Pur.*; but it was amended: now the alteration of the *effoin* in that case was more than in this. So where a writ of error was brought in the court of king's bench (b), upon a judgment in replevin for the defendants, and an error assigned in the entry of the judgment, in which these words were omitted, that the plaintiff "*nil capiat per breve suum, sed sit in misericordia pro falso clamore*," and that the defendants "*eant inde sine die*;" but it was amended, and all these words were inserted in another Term. So where a judgment general was given against an executor, and it was not entered *de bonis testatoris in manibus* of the defendant administered, and yet that was amended in my LORD HALE's time (c); and even in the very last Term in the common pleas several *continuances* were omitted, and upon great debate it was amended (d).

CURIA. This is amendable, if the Court had any thing to amend it by. It is the act of the Court, and yet judgment is not given by them as to the damages. It might have been amended in the same Term; for though it is entered on THE ROLL, yet the Court has power to amend any fault in a record during that Term wherein it was entered (e).

(a) 4. Edw. 3. pl. 9. b.

(b) 2. Mod. 316.

(c) 2. Lev. 22. Carth. 167.

(d) See 1. Salk. 177. Stiles, 339. Strange, 62. 1. Com. Dig. "Amendment," (1.).

(e) HOLT, Chief Justice, was of

opinion, that it could not be amended, because it would be making a new judgment, and because the motion came too late; but ROBERT, Justice, thought it might be amended, because it was for a just debt: but it was adjourned. 3. C. Ld. Raym. 68.

* The King *against* Clough and Others.

Cafe 77.

THE DEFENDANTS were indicted at *the sessions* upon the statute 1. & 2. *Philip and Mary*, c. 7. by which it is enacted, "That no person dwelling in the country out of a corporation or market-town shall sell, or cause to be sold, by retail, any woollen cloth, linen cloth, haberdasher wares, or mercery wares, in any corporation or market-town, or the liberties thereof, except in open fairs, under the penalty of six shillings and eight pence for every offence, and the forfeiture of the wares sold, or offered to be sold; one moiety to the queen, the other to the seizer or prosecutor, &c."

The indictment set forth, that the defendants had sold earthenware in *London*, *contra formam statuti*.

But it was quashed upon a motion, because the statute does not give justices of peace any jurisdiction to proceed in this matter at their *sessions*, for they are not so much as named in the act.

The sessions cannot take an indictment on a statute creating a new offence not against the peace, unless so authorised by express words.

4. Mod. 51. 379.
Cro. Eliz. 87.
9. Co. 113.
2. Salk. 406.
475. 680.
Fitzg. 83, 84.
Stra. 1256.
4. Com. Dig.
8vo. 523.

The King *against* the Inhabitants of Wootton-Rivers. Cafe 78.

TWO justices of peace made an order for the removal of a poor woman from one parish to another.

The order recited, "that upon complaint made to them," but did not say, "by the churchwardens or overseers of the poor, &c."

Exception being taken to the order, it was insisted at the bar,

FIRST, As to the order itself, that it is not necessary to set forth, that the complaint was made "by the churchwardens, &c." but where it is expressly alledged in the order, that the person to be removed "did endeavour to settle himself in a tenement under the yearly rent of ten pounds (a)," which was not mentioned in this order, but only that he was "likely to be chargeable, &c.:" and if so, then any of the parishioners may complain.

To which it was answered, and RESOLVED BY THE COURT, that the complaint must be made by the *public officers of the parish*, to whom the care of the poor is entrusted by law, and without such complaint the justices of peace have no power to remove the person (b); for the rest of the parish may be willing to keep him,

Carth. 222. Foley, 267. 1. Burr. S. C. 24. Andrews, 361. 2. Stra. 1158. 2. Burr. S. C. 163.

The justices have no authority, on 13. & 14. Car. 2. c. 12. to remove paupers, except on complaint of the parish-officers; and therefore an order made "on complaint," omitting "of the churchwardens, &c." is bad.
S. C. Holt, 510.
S. C. 2. Salk. 492.
S. C. Carth. 365.
S. C. 3. Salk. 254.
S. C. Sett. & Rem. 18. 163.
S. C. 12. Mod. 89.
S. C. Foley, 72.

(a) Rex v. Graffham, Sett. & Rem. 16. 2. Bott P. L. 764. pl. 683.—See also Rex v. South Marston, Stra. 189.

(b) Rex v. Hareby, Andr. 361. But see Rex v. Forrest, 3. Term Rep. 33.

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or may take security of another parish to * indemnify them in particular from any charge which may arise by his poverty, and so they will have no reason to complain.

An order of removal omitting to state that it was made on complaint of the parish officers, cannot be made good by the return of the *certiorari*.

SECONDLY, it was insisted, that if it be a fault, yet it is helped by the return of the order; for there the justices certify, that it was "upon complaint made to them by the churchwardens, &c.;" so that if it be defective for this omission, it is helped by the return.

But THE COURT resolved, that as to the return, it is not material to support this defect; for the order itself is THE RECORD, and not the return of the *certiorari*, which cannot make a void order good, because the justices of peace have executed their authority by assigning the order, and therefore shall not support this defect by any subsequent matter.

An order of removal good, though not alleged that the pauper "came to settle in a tenement under 10l. a year."

NOTA, There was another exception to this order, viz. that it was not alledged that the person came to settle in a tenement under the yearly value of ten pounds.

But THE COURT held the order to be good notwithstanding that exception, for of late years it is seldom expressed in orders; and because the practice had been so, they thought fit to continue it.

Comb. 339.
Stra. 141. 189.
393. 698.

So it was quashed upon the first exception.

Cafe 79.

Pullen against Palmer.

Trinity Term, 6. Will. 3. Roll 179.

In replevin, if the defendant avow the taking for rent, it is sufficient to say, that he was seised generally, without stating of what estate.

IN REPLEVIN, the defendant avowed in his own right, setting forth, that the *locus in quo* was parcel of a tenement whereof such a person was seised, who by bargain and sale granted it to thirteen persons and their heirs; that they being seised thereof granted the premises to thirteen more. Then he shewed, that four of these thirteen were dead, and that nine were living, of whom he was one; that there was rent in arrear, *per quod idem* (the defendant) *in jure suo proprio bene advocat captionem, &c.*

S. C. 3. Salk.
207.
S. C. Carth. 328.
S. C. 2. Lutw.
1211.
2. Salk. 562.
629.
1. Sid. 298.
1. Lev. 190.
2. Salk. 216.
2. Sid. 10, 11.

The plaintiff replied, that one of the nine surviving grantees released the said rent.

To this replication the defendant demurred, and the plaintiff joined in demurrer.

The exceptions to the avowry were :

FIRST, The defendant sets forth, that he was seised generally, and does not say of what estate, either in fee or for life (a).

(a) But now by 11. Geo. 2. c. 19. " the distress was made, enjoyed the
" All defendants in replevin may avow " some under a grant in demise, &c.
" or make confession generally, that the " without setting forth the grant, or
" plaintiff in replevin, or other tenant " sure, demise, or title, &c. &c."

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SECONDLY, That the estate was conveyed by *bargain and sale*; *Bargain and sale will raise a use.* and it may be a question, Whether this is a sufficient conveyance to raise an use?

1. Co. 87. 3. Co. 94. Co. Lit. 271. 1. Burr. 95. Sanders on Uses and

1. Mod. 262.
2. Mod. 252.
Trusts, 409.

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THIRDLY, and lastly (which was chiefly relied on), That he did not sever in the *avowry*; for he ought to have *avowed* in his own right, and to have made *cognizance* as bailiff to the rest; but having *avowed* generally, and made no *cognizance* as * bailiff to the other *jointenants*, the *avowry* cannot be good; for though he may *distrain* for himself, yet he must do it as the law directs; for his fellows *jointenants* must join in an *avowry* for *damage feasant*, and much more for a rent: all the entries are so (a).

If *joint-tenants* *distrain*, and the goods be *replevied*, they must sever in *avowry*, or the *avowant* must *avow* in his own right, and make *conu- sance* as bailiff to the rest.

S. C. Ante, 71.

Co. Lit. 145.

Carth. 364.

Comb. 329.

347. 474.

Cro. Eliz. 530.

4. Bac. Abr.

662.

Espinass. Dig.

374.

2. Lutw. 1211.

3. Bac. Abr.

216.

5. Term Rep.

247.

To which it was answered, that this is but form, for the defendant had *avowed* for a rent, and had shewed the special matter; and therefore his *avowry* is good: for if one *jointenant* make a *distrress* for the whole rent in arrear, and levy the whole, the taking is good, for he is accountable to the rest (b); and in this case the defendant has specially shewed, that such a rent was due to him, and to them, who being *jointenants* were *seised*, and so it is well enough. A rent-charge was granted to the father and his heirs during his life, and the lives of his wife and two daughters; one of them married the defendant, who *avowed* for the rent arrear before marriage due to him and his wife; which being assigned for error, it was held (c) to be no more than *form*, because the *avowry* being for rent arrear, to say that it was due to him and his wife is but *surplusage* (d); and that *avowry* was held good in substance.

Adjournatur (e).

(a) Thompson's Entries, 264.

(b) See Tooker's Case, 2. Co. 67. *contra*.

(c) Bowles v. Poore, Cro. Jac. 282.

Wile v. Bellent, Cro. Jac. 442.

(d) 1. Roll. Abr. 318.

(e) See S. C. ante, 71. to 73.

The Company of Vintners against Clerke.

Case 80.

JUSTICIAR. dom. regis ad placita coram ipso rege tenen. ego JACOBUS FELL, custos gaolæ dicti dom. regis de NEWGATE humillime certifico quod civitas LONDON modo est, et a toto tempore cujus contrarii memoria hominum non existit fuit, antiqua civitas; quodque cives et liberi homines civitat. il. a toto tempore supradicto cujus contrarii memoria hominum non existit. fuerunt incorporat. (a)

The return to a writ of *habeas corpus* made by the keeper of *Newgate* on a commitment by the court of mayor and aldermen of the said city.

men of a freeman for refusing to take upon himself the office of *liveryman*

(a) The gaoler has laid a prescription in the VINTNERS to be a Company when they were incorporated but in the

reign of Edward the Sixth.—NOTE to the former Editions.

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tam per nomen majoris communitat. ac civium civitat. LONDON, quam per nomen major. communitatis civitatis LONDON.; ac quod de præd. civibus a toto tempore supradicto fuer. et adhuc sunt sepeal. societat. guild. et fraternitat. infra eandem civitatem unde societas mysterii Vintarum in præd. civitat. LONDON a toto tempore præd. incorporat. per nomen magistri custod. ac. liberorum hominum ac colitat. mysterii Vintarum civitat. LONDON fuit et est un. quodque tam de et in præd. societate Vintarum quam de et in omnibus aliis societatibus, guildis sive fraternitatibus infra eandem civitatem sunt et a toto tempore supradicto fuerunt quidem homines existen. cives civitat. præd. ac liberi homines earundem societat. guild. sive fraternitat. respectivè, VOCAT. livery-men, qui de tempore in tempus et a toto tempore supradicto electi fuerunt et eligi consuever. per societatem, guild. sive fraternitat. unde hujusmodi homines liberi extiterunt et quilibet liber extitit respectivè in liberatur. ANGLICE the livery, ejusdem societat. guild. sive fraternitat. unde ipse respectivè sic ut præfertur liberi homines, extiter. qui quidem homines et quilibet eorum respectivè sic electi. existen. idonei et non habentes seu habens aliquam rationabilem causam sive excusation. in contrarium inde officium sive locum unius liberatur. ANGLICE of a liveryman, ejusdem societat. guild. sive fraternitat. respectivè in qua quilibet hujusmodi liber homo elect. fuer. fore de liberatur. inde a toto tempore supradict. in se susceperunt et suscipere totaliter fuerunt ac debuerunt et debent ac officium il. ac omnia officii sive loci illius onera et expensa et denariorum summas erga supportationem et in et pro bono publico et pro meliori regimine ejusdem societat. a toto tempore supradicto solverunt et solvere soliti fuerunt et debuerunt. Et ulterius certifico quod infra civitat. præd. habetur et a toto tempore supradicto cujus contrarium memoria hominum non existit habebatur quædam curia dom. regis nunc et prædecessorum suorum regum et reginarum Angliæ de record. tent. septimatim quolibet die Martis et quolibet die Jovis coram majore et aldermannis civitat. præd. pro tempore existen. in GUILDHALL ejusdem civitatis scituat. in parochia SANCTI MICHAELIS BASSISHAW in warda de BASSISHAW in qua quid. curia major et aldermanni civitat. præd. pro tempore existen. a toto tempore supradict. tractaverunt regulaver. et ordinaverunt et tractari regulare et ordinare usi fuerunt et consueverunt omnia ad præd. sepeal. societat. guild. et fraternitat. civitat. præd. pro tempore existen. tangen. et spectan. vel quovismodo concernen. quæ coram eis dilat. fuerunt pro meliori regimine et yubernatione inde in supportation. honoris et dignitatis ejusdem civitatis; quodque liberi homines existen. cives civitat. LONDON præd. qualibet societate guild. sive fraternitate civitat. LONDON præd. et eor. quilibet toto tempore supradicto fuerunt et fore consueverunt et adhuc existunt sub regimine yubernatione correctione et punitione præfat. major. et aldermanner. civitat. præd. pro tempore existen. in curia præd. in forma tent. pro omnibus et singulis materiis per aliquem hujusmodi liberum hominem societat. præd. inde fact. sive fieri omiff. contra sive in præjudicium boni regiminis et yubernationis præd. societatis guild. sive fraternitat. civitat. præd. Et ulterius certifico quod infra civitat. præd. habetur et

a toto

a toto tempore supradicto habebatur quædam al. consuetudo infra civitat. præd. a toto tempore supradict. usitat. et approbat. quod si aliqua querimonia; ANGELICE complaint, fact. fuit in scriptis vel ore tenus præfat. major. et aldermannis civitat. præd. pro tempore existen. in * curia præd. sic ut præfertur coram eis secundum consuetudinem præd. tent. per magistrum et custod. alicujus societatis civitat. præd. infra eandem civitatem sive per membra principalia alicujus societatis civitatis præd. infra eandem civitatem in qua non fuerunt magistri sive custod. seu eorum aliquis ostenden. quod aliqua persona existens civis civitat. præd. ac membrum ejusdem societatis electus. et idoneus pro officio illo fuit per societatem. il. liberatur. ejusdem societatis unde ipse membrum extitit. ac requisit. fuit ad officium sive locum unius de liberatur. ejusdem societatis suscipien. ac ad onus officii sive loci illius subeun. et sustinen. quousque hujusmodi civis liber homo ac membrum hujusmodi societatis. absque rationabili causa sive excusatione in contrar. inde fore de liberatur. hujusmodi societatis officium sive locum il. suscipere ac onus officii sive loci illius subire et sustinere recusavit ac inde petiens remedium auxilium et justitiam ejusdem curia coram majore et ald. ejusdem civitat. pro tempore existen. sic ut præfertur secundum consuetudinem præd. tent. in præmissis versus talem personam sic recusantem ac superinde talis persona versus quam hujusmodi querimonia fact. fuit existen. civis liber homo ac membrum hujusmodi societatis coram præfat. majore et ald. civitat. præd. pro tempore existen. incuria præd. convent. existen. coram iisdem majore et ald. in eadem curia præmissa cognoverit vel non dediderit sed monitus per eandem curiam ad seipsum conforman. in ea parte ad officium sive locum il. super se suscipere ac onus officii sive loci illius subire et sustinere aperte voluntarie obstinate et contemptuose absque aliqua causa sive excusatione quacunque in contrarium inde fore de liberatur. ejusdem societatis unde ipse sic ut præfertur membrum existen. vel onus officii sive loci illius subire et sustinere in eadem curia recusaverit; tunc iidem major. et ald. civitat. LONDON pro tempore existen. in eadem curia tent. secundum consuetud. per totum tempus præd. usitat. et approbat. hujusmodi personam sic recusantem in prisonam sub custodia vic. civitat. LONDON pro tempore existen. aut al. officiar. ibidem mandaver. et commiserunt ibidem sub custodia remansur. et fore detent. quousque eadem persona quæ sic in prisona commissa fuit conceitret et declararet quod ipse officium sive locum præd. inde susceperet ac onus officii sive loci subiret et sustineret vel aliter hujusmodi persona extra prisonam et custodiam præfat. vicecomitis vel alii officiar. civitat. præd. per debitum legis cursum deliberaretur et exoneraret. ; quæ quidem separat. consuetudines supra mentionat. necnon omnia alia consuetudines et libera usuagia, ANGELICE frank usages, civitat. præd. infra præd. civitat. usitat. autoritate parlamenti DOM. RICHARDI nuper regis Angliæ post Conquestum secundi * tent. apud WESTM. in com. MID. anno regni sui septimo tunc majori et communitat. civitat. præd. ratificat. et confirmat. fuerunt. Et ulterius certifico quod ante adventum dicti brevis de habeas corpus mihi in hac parte direct. scilicet quarto die Junii anno regni dom. regis nunc septimo, ISAAC CLERKE in brevi huius schedulæ annex. nominat. qui adtunc et diu antea et continuè postea hucusque

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fuit et adhuc existit. civis civitat. præd. ac liber homo et membrum præd. societatis VINTARUM in civitat. LONDON prædict. per societatem illam debito modo electus fuit in liberatura ejusdem societatis adtunc et adhuc existen. idoneus homo pro officio illo ac ad officium sive locum unius liberatur. ANGLICE of a livery-man, ejusdem societatis in se suscipien. ac ad onus officii sive loci illius subeund. et sustinen. secundum consuetudinem civitatis præd. a toto tempore supradicto usitat. et approbat. in eadem; unde idem ISAAC CLERKE adtunc notitiam habuit et ad officium illud super se suscipien. requisit. fuit quod facere præd. ISAAC CLERKE adhuc penitus recusavit. Super quo postea et ante adventum præd. brevis de babeas corpus mihi in hac parte direct. scilicet die Martis tertio die Decembris anno regni dilecti dom. regis nunc septimo quædam querimonia, ANGLICE a complaint, fact. fuit ore tenus JOHANNI HOUBLON mil. adtunc et adhuc majori et tunc ald. civitat. præd. in curia præd. tunc tent. coram præfat. majore et ald. civitat. præd. per quendam THOMAM COLLETT adtunc magistrum et quosdam LUDOVICUM WILSON, THOMAM FEILDER et JOHANNEM KNAPP, adtunc custod. societatis VINTARUM in civitate LONDON præd. ostenden. quod præd. ISAAC CLERKE existen. civis et liber homo civitatis præd. ac membrum societatis VINTARUM præd. in civitate LONDON præd. et idoneus homo pro officio præd. existen. electus fuit per societatem illam in liberatura ejusdem societatis et adtunc et diu antea idoneus homo existen. tam ad officium quam ad onus ejusdem officii subeun. requisitus fuit ad officium sive locum unius de liberatura ejusdem societatis in se suscipien. ac ad onus officii sive loci illius subeun. et sustinen. idem tamen ISAAC CLERKE civis et liber homo civitatis præd. ac membrum ejusdem societatis obique aliqua rationabili causa sive excusatione in contrarium inde fore de liberatura ejusdem societatis et officium sive locum illum in se suscipere ac onus officii sui loci illius subire seu suslinere penitus recusavit; ac proinde magistri et custodes per querimoniam illam remedium auxilium et justitiam curia præd. coram majore et ald. præd. secundum consuetudinem præd. tent. in præmissis præd. versus præfat. ISAAC CLERKE petierunt. Ac superinde præd. ISAAC CLERKE coram præfato majore et ald. civit. præd. in curia præd. adtunc et ibid. secundum consuetudinem præd. coram majore et ald. civitat. præd. tent. convent. * existen. et personaliter comparen. coram iisdem majore et ald. civitat. præd. in eadem curia præmissa præd. non dedixit, videlicet quod ipse existen. civis et liber homo civitatis præd. ac membrum ac liber homo societatis præd. ult. mentionat. existen. ac etiam idoneus homo tam ad officium præd. quam ad onus officii illius subeun. electus fuit per societatem illam in liberatura ejusdem societatis et requisit. fuit ad officium sive locum unius de liberatura ejusdem societatis suscipien. ac onus officii sive loci illius subeun. et sustinen. ac præd. major et aldermanni præd. electionem præfat. ISAAC CLERKE ut præferatur fact. approbaverunt et allocaverunt, idem tamen ISAAC CLERKE civis et liber homo civitatis præd. ac liber homo et membrum societatis illius et idoneus homo ut præferatur existen. officium sive locum illud in se suscipere ac onus officii sive loci illius subire et sustinere recusavit coram præfat. majore

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maior et aldermannis civitatis præd. in aperta curia prædict. coram prædict. maiore et ald. die et loco ultimo supradicto tent. Super quo præd. ISAAC CLERKE adtunc et ibidem in eadem curia per præfat. maiorem et aldermannos civitat. præd. ad se ipsum conforman. in ea parte ac ad officium sive locum illum in se suscipien. ac ad onus officii sive loci illius subeun. et sustinen. sæpius in eadem curia ibidem monitus fuit; præd. tamen ISAAC CLERKE non habens nec allegans aliquam causam sive excusation. quamcunque in contrarium inde post huiusmodi monitionem sibi in forma præd. fact. fore de liberatione ejusdem societatis ac officium sive locum illum in se suscipere ac onus officii sive loci illius subire seu sustinere in eadem curia ibidem adtunc aperte voluntarie obstinate et contemptuose absque aliqua causa sive excusatione quacunque in contrarium inde officium illud suscipere super se et onus inde subire adtunc et ibidem renuit et expresse recusavit, per quod præfat. major et aldermanni civitatis LONDON præd. adtunc et ibidem in eadem curia ante adventum præd. brevis de habeas corpus præfat. ISAACUM CLERKE sic recusantem per quoddam warrantum in scriptis secundum cons. præd. in prisona sub custodia mea mandaver. et commiser. ibidem remansur. et fore detent. quousque idem ISAAC CLERKE conceitaret et declararet quod ipse officium sive locum præd. in se suscipere ac onus officii sive loci illius subiret et sustineret vel aliter per debitum legis cursum deliberat. et exonerat. foret. Et ulterius certifico quod præd. ISAAC CLERKE ad aliquod tempus hucusque non consentivit seu declaravit quod ipse idem ISAAC CLERKE officium sive locum præd. in se suscipere seu onus officii sive loci illius subire et sustinere voluit nec officium et locum il. in se suscepit nec onus officii sive loci illius subivit seu sustinuit; et hæc est causa captionis et detentionis præd. ISAAC CLERKE in * prisona mea, quam una cum corpore præfat. ISAAC CLERKE coram præd. JOHANNES HOLT mil. capital. justiciar. præd. dicti dom. regis nunc ad placita coram ipso rege tenen. assign. ad tempus et locum in brevi huic schedulæ annex. detent. parat. habeo una cum dicto brevi prout mihi per idem breve præcipitur.

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The Company of Vintners against Clerke.

Case 81.

UPON an habeas corpus directed to the keeper of NEWGATE he returned, That THE CITY OF LONDON is an ancient city, and that the citizens and freemen thereof have, time out of mind, been incorporated by the name of "mayor, commonalty, and citizens, &c." that there are several companies, guilds, and brotherhoods amongst the said citizens, of whom THE COMPANY OF VINTNERS is one; which company was incorporated by the name of "master, warden, freemen, and commonalty of the and aldermen, on complaint, by a company, of a freeman, so chosen on the livery, refusing, after being admonished, to accept the office, may commit the person so refusing to the custody of the sheriffs, or other officers of the city, until he shall consent to take upon him the said office.—S. C. Post. 319. S. C. 1. Salk. 349. S. C. Holt, 430. S. C. Comb. 411. S. C. 3. Salk. 92. S. C. 12. Mod. 113. S. C. Com. 24. 1. Mod. 10. 164. 4. Mod. 27, 28. 6. Mod. 123. 177. Ray: 447. 1. Salk. 341. 352. Ante, 104. Post. 438, 439. 2. Lev. 200. 2. Keb. 555. 1. Bac. Abr. 681. 2. Term Rep. 2.

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"mystery of vintners;" and that some *freemen* of that company were always of *the livery*, and chosen by that company, who being so chosen and fit persons for the said office, did usually hold the same, without some reasonable excuse to the contrary; that there was a court of record held in the said city before the lord mayor and aldermen at *Guildhall* twice in every week, where rules and orders were made in all things relating to the several companies for the better government of the city, and that the said companies were under the correction of that court: that there is a custom in the said city, that if any complaint be made to the mayor and aldermen of the said court, by the master and wardens of any company, of a *livery-man* chosen, and refusing to take the office, being admonished by that court to accept it; that then the mayor and aldermen have used to commit the person so refusing to the custody of THE SHERIFFS OF LONDON, or any other officer, there to be detained until he should consent and declare that he would take upon him the said office. Then he sets forth, that these customs were confirmed by act of parliament; and that before the issuing forth of the said writ, one *Isaac Clerke*, being a citizen of *London*, and a *freeman* of THE COMPANY OF VINTNERS, was chosen of *the livery*, and required to take upon him the said office, which he refused: thereupon complaint being made to the mayor, &c. by the master and wardens of that company, the said *Clerke* was summoned to appear, &c. which he did, and refused to take upon him the said * office, and, being admonished by the court to conform, did still refuse: that the mayor, &c. by a *warrant* in writing, did commit him to custody, there to remain until "he shall consent and declare that he will accept the said office;" and that this was the cause of his taking and imprisonment.

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THOSE WHO ARGUED *against this return*, said, that it consisted of several facts, of which this court could not take any notice; but that none of these facts were contained in the warrant of commitment, and that no matter ought to be put in *the return* which *the warrant* itself does not lead unto.

A commitment by the court of mayor and aldermen of *London* of a *freeman* of that city, for refusing to take up his *livery*. "until he shall consent and declare that he will accept the said office," is bad.

FIRST, That the return is void, both in *substance* and *form*; and it is void *in form* for these reasons: Because it is laid specially, that the mayor and aldermen have a custom to commit, till the offender shall *consent* and *declare* his willingness to take upon him the office; but he did not set forth *to whom* he should signify such consent: it being therefore uncertain to whom such a declaration should be made, it is void for that reason, especially in this case, where the liberty of the subject is concerned, which is so much favoured by the law.

TO THIS FIRST EXCEPTION it was answered, that if the party declare his *consent* to any person that he will accept the office, it is sufficient; for, upon such a declaration of his mind, he may be brought before the court and discharged from his imprisonment.

CURIA. A commitment, "till he shall *declare* his consent to "accept the office," is more than if he had been committed "till he "should actually *consent*;" therefore, though the court of aldermen might commit him "until he shall *consent*," yet they may have no power to imprison him "till he should *declare it*."

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SECOND EXCEPTION, It is a void and impertinent custom to commit a man to prison until he shall consent and declare to "hold an office." The mayor and aldermen may have a power to summon men before them by virtue of some ancient custom, in order to reform or punish offenders; but the commitment in this case is not a punishment for the refusal to take the office, but because the defendant would not declare he would do it; and when such a declaration is made, then he is at large again, and may break his word by refusing to be of the livery, &c. They might have imposed a penalty to be levied by distress, but ought not to commit the offender; and thus it was adjudged in *Clerke's Case (a)*: the Town of *St. Albans* was incorporated by *Edward the Sixth*, and had power to make bye-laws; and THE TERM being held there, the mayor, by the consent of *Clerke* who was one of the burgesses of the town, &c. made an order for assessing every inhabitant to the charge of erecting courts for the judges and suitors, and those who refused to pay, to be imprisoned; *Clerke* refused; but it was adjudged, that the mayor could not justify his commitment by virtue of that order, because he ought to have inflicted a pecuniary punishment, or he might have brought an action of debt upon the bye-law, made for the forfeiture of a particular sum (b). * A custom for the court of aldermen to commit until the offender should take the oath of alderman, was held good (c), because it is a public office for the administration of justice, and for the government of the city, which are things of necessity; but it does not appear, that the office of a *liveryman* is of any public concernment. There are but few authorities in the Books relating to this objection; some there are; as for instance: In an action of false imprisonment (d), the defendant justified under a custom in *London*, to commit a man for disturbing the election of a warden of a company, and to continue him in custody "until he would promise not to disturb such elections:" and upon a demurrer to this plea, the plaintiff had judgment. So upon the return of a *habeas corpus* (e), the cause of imprisonment appeared to be, for that he being chosen of the *livery* refused to serve, and it was not until he should make an insignificant declaration of his consent to hold the office; and yet, in that case, the imprisonment was adjudged to be illegal; for they might have fined the offender, and have brought an action of debt for the fine; but they could not commit for such a refusal.

Quære, Whether a custom in a corporation to commit a freeman, until he shall consent and declare his willingness to take up his livery, be good.

* [158]

(a) 5. Co. 64. a. 1. Jones, 162.
Moor, 411. 580. 8. Co. 127.
(b) Winch, Ent. 252.

(c) March, 179.
(d) Stiles, 78. 84.
(e) 1. Mod. 10.

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AS TO THE SECOND EXCEPTION, 'The illegality of the custom itself, to commit for refusing to take upon him the office of liveryman, it was argued, that the *customs of London* are confirmed by act of parliament, to which all people virtually give their consent; therefore a commitment by virtue of a *custom* thus confirmed, in order to enforce an obedience to it, is justifiable by the law of the land. The City of *London* have many customs more unreasonable than this is, and which likewise tend to restrain men of their liberty, and yet they are allowed, because they co-operate with an act of parliament: as for instance: there is a custom for a creditor to arrest a debtor before the day of payment, in order to compel him to give better security for the debt. There is another custom for a constable, upon suspicion only of any immorality, to break open an house, and to commit the offenders, which is expressly contrary to law; and yet such customs, being the particular usages of the city, are become *leges loci*, and, being confirmed by act of parliament, are binding to the inhabitants. Then a commitment *quousque* may be good according as the fact is, unless it be in execution; and so was the commitment in *Alderman Langham's Case* (a), until he should take the oath of alderman, &c. Besides, the court of aldermen is a court of record; the judges send prohibitions to them (b). Now it appears upon the return, that the defendant *voluntariè, obstinatè, et contemptuosè*, refused to take upon him *the livery* of his company, and it is incident to a court of record to commit for a contempt.

If the court of aldermen commit a freeman by warrant in writing, for refusing to take up his livery, the gaoler, in making a return to a *habeas corpus*, must set forth the warrant at large.

S. C. Salk. 349.
2. Vent. 23.
Carth. 75.
4. Com. Dig.
"Habeas Corpus" (E, 3).
2. Bl. Rep. 806.

AS TO THE THIRD EXCEPTION, The gaoler has not set forth his WARRANT in *hæc verba*, but only that *per quoddam warrantum in scriptis secundem consuetudinem, &c.* the defendant was committed; and this is introduced with a long story, not pertinent to the commitment itself, of which he has not set forth any cause. Now by the statute 31. Car. 2. c. 2, commonly called THE HABEAS CORPUS ACT, the Judges of either court in *Westminster* may, upon application made to them by the prisoner, and upon view of the copy of the warrant of commitment, or upon oath made that it was denied, grant a *habeas corpus* in vacation-time, returnable *immediatè*; which statute would be eluded if the warrant itself should not be returned; for if the officer should return any cause different from the warrant of commitment, and such for which a *habeas corpus* is not allowed by that act, then the person must still be kept in custody, though he be really bailable by law, and he has no remedy but to bring an action against the gaoler for a false return: therefore it seems necessary, that he should return the whole tenour of THE WARRANT, that the Court may make a proper judgment of it; for otherwise by a return of the commitment generally the gaoler makes himself a judge of the cause. * Neither does it lie in the power of the officer to mend the warrant of commitment, but he is to return it as it is, that the Court may judge of it; it is his own excuse for keeping the prisoner in custody; and if the return

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(a) March,

(b) 8. Co. 119,

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and the warrant do not agree, he may keep him in custody longer than the law allows. The whole warrant was returned in *Batbell's Case* (a); and this is agreeable to law in other proceedings; for if a man be bound to make a sufficient release to another, it is not enough for him to say generally, that he executed a release, but he must set it forth at large, that the Court may judge whether it is sufficient or not. The HABEAS CORPUS ACT takes care, that a person who is bailed shall not be recommitted for the same offence, under the penalty of five hundred pounds to the party grieved, "any colourable pretence or variation in the warrant of commitment notwithstanding." From which it may reasonably be inferred, that the makers of that law did intend the THE WARRANT should be returned; otherwise if the party should be recommitted, how can it appear to be for the same cause for which he was in custody before? Now it does not appear upon this return, but that THE WARRANT may be illegal, and the commitment not to be justified by law: therefore it ought to be set forth at large, that the Court may judge of the legality of it. It is always so in the common cases of orders made by justices of peace; for it may not appear in the order itself, that those who signed it were justices of peace at that time; and though it should appear so upon the return of the *certiorari* to remove such order, yet this Court would quash it (b).

As to THIS THIRD EXCEPTION, viz. That the warrant is not returned *in hac verba*; it was said, that it is not necessary; for though the law favours liberty, yet it favours likewise magistracy and proceedings in courts of justice. If the commitment had been by *mesne process*, then it might be necessary to set out THE WARRANT at large; but when it is in a judicial way by a court of justice, it is not usual to do it: as if a commitment be made by the court of king's bench and a *habeas corpus* be directed to THE MARSHAL, he never returns the warrant itself. Therefore this is not within THE HABEAS CORPUS ACT, for it is a commitment in execution by a court of record for a contempt of their authority, and in such case the warrant itself is never returned. It is sufficient to say, that the person was committed *per mandatum domini cancellarii vel dominorum in concilio*; and it is likewise sufficient, as in this case, to set forth, that it was *per warrantum in scriptis secundum consuetudinem civitatis, &c.* At common law it was sufficient to set forth the substance, and not the thing itself, which must be understood where the officer did not take upon him to disclose the whole fact; but here he has returned the whole matter; which if not true, it is at the peril of him who made the return, and the party grieved may have a remedy by action.

Quere, For it concludes thus, "till he shall be discharged by due course of law;" which is not a commitment in execution.

Raym. 446.
Brownl. Eod. 385.

CURIA. The warrant is always set forth at large in a return made upon an extrajudicial commitment; but when a man is committed by a court of record, there is no warrant at all; therefore the court of aldermen in this case cannot be intended to proceed

(a) Ante, 19.

(b) See the case of the King v. Inhabitants of Wootton Rivers, ante, page 150.

judicially,

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judicially, because the commitment is *per warrantum in scriptis*. They are the proper judges of an excuse made by the defendant why he will not take upon him *the livery*; and if they adjudge it insufficient, and appoint him to accept it, and he refuse, it is a contempt of their authority, for which they may commit him.

On a custom in a corporation to commit "to the Sheriff of London, or other officer," a commitment to "The Keeper of Newgate" is bad; for the Court will not intend that the Keeper of Newgate is an officer of the city of London.

THE FOURTH EXCEPTION, and the most insisted on, was, that in the return a custom was laid for the mayor, &c. to commit the offender "to the custody of THE SHERIFFS of London, or other officer;" and the gaoler had returned, that he was committed *custodiæ meæ*, when it does not appear that he was either SHERIFF or officer at that time; so that more is put in the judgment than that is warranted by the custom. It is likewise said, that he was committed to prison, but does not say where. If he had returned, that the prisoner was committed to *Newgate*, it might have been better; yet that would have been insufficient; for though *Newgate* is the king's gaol, and admitting that the person to whom the defendant was committed was then keeper thereof, yet that does not make him appear to be an officer of the city at that time.

Co. Edl. 346.

AS TO THIS FOURTH EXCEPTION, viz. That it is not returned, that THE KEEPER OF NEWGATE was an officer of the city; it was answered, that the return begins thus, "*Ego JACOBUS FELL, custos gaolæ domini regis de NEWGATE, &c.*" and when he comes to the warrant, he sets forth, that the defendant was committed to prison "*in custodiâ meâ*;" which can be intended of no other person than he who was at that time keeper of *Newgate*, who is well known to be an officer of the sheriffs of London, for the Judges deliver that gaol every month.

CURIA. He is committed to THE KEEPER OF NEWGATE, who may be an officer of the city, but not one attending the court of aldermen; so that it does not appear that he is a proper officer of that court to receive him, and therefore not like a commitment by the court of king's bench to THE MARSHALL, who is a proper officer always attending that court; and so is the sheriff, where the commitment is made by a Judge of *oyer and terminer*: neither does it appear that NEWGATE is in London; but if it did, he ought to be committed to THE SHERIFFS, and not to THE KEEPER OF NEWGATE, though they might have taken him as their officer; but this Court cannot take notice that he is an officer to the sheriffs, no more than they can what boroughs send burgesses to parliament. As for instance; by the statute 17. Car. 2. c. 2. s. 3. those who preach in *conventicles* shall not come, or be within five miles of a borough which sends burgesses to parliament: a man was indicted upon this statute for living in such a borough; but it was quashed in this court, because it was not averred, that the borough wherein the defendant lived did send burgesses to parliament. Now certainly it is as well known to this Court, what boroughs send burgesses to parliament, as that THE KEEPER OF NEWGATE is an officer of THE SHERIFFS of London.

FIFTH

Hilary Term, 7. Will. 3. In B. R.

FIFTH EXCEPTION. It is said, he was committed *quousque concetiret*, which is void and insensible, there being no such word. A commitment *quousque concetiret* is insensible and void.

Then as to **THIS SIXTH EXCEPTION**, viz. That the word "*concetiret*" being insensible, it is therefore void; it was said, that the following word "*declararet*" hath a certain signification, and is more comprehensive than "*consentiret*" if it had been right, because a man may *consent* to a thing, and never *declare* his consent openly; but when he makes a declaration thereof, he does both.

And for the fourth exception the return was held insufficient, and the defendant was discharged.

* The King against Hall.

* [163]
Case 82.

AN ORDER was made by two justices of peace, to remove a poor man from *Redburne* to the parish of *St. Michael* in *St. Albans*; and upon an appeal to the quarter sessions, the order of the two justices was quashed. Afterwards upon a *certiorari* brought, the sessions order was quashed, and the first order was confirmed, so that the poor man was now settled at *St. Albans*. But of his own accord he returned to *Redburne*, and the justices conceived that they had not any power to send him to the house of correction for returning as aforesaid, because they were of opinion that the first order was not before them, being removed by *certiorari*.

If an order of removal be quashed at sessions, but confirmed on *certiorari* to king's bench, the justices may commit the pauper for returning to the place from whence he was removed, altho' the order was quashed.

Therefore a motion was made, that the Court would grant a rule to enforce the execution of the former rule made in this case, by which the sessions order was quashed, and the order of the two justices confirmed.

Post. 209. 397. 416.
Comb. 374.
2. Salk. 481.
Fitzg. 254.
B. R. H. 124.
1. Burr. Rep. 595.
2. Bott, 795.
2. Term Rep. 709.

But **THE COURT** directed, that the justices should have the former rule of Court shewed to them, and the order of the two justices, and if they refused to punish the person afterwards, then to move the Court upon an affidavit of the matter (a).

(a) See 13. & 14. Car. 2. c. 12. s. 3; and 17. Geo. 2. c. 5. Mr. Conft's Edit. of Botr's Poor Laws, 2d vol. 792.

The King against Paine.

Case 83.

INFORMATION tried at **THE BAR** by a *Bristol Jury*, against one *Samuel Paine*, a minister there, setting forth, that the defendant was the composer, author, and publisher, of a most malicious and wicked libel against the late **QUEEN MARY**, which was styled "*Her Epitaph*."

The depositions of witnesses taken *ex parte* before a magistrate in an examination concerning a *misde-*

meanor, cannot be read in evidence on the trial of the party for such *misdeemeanor* after the death of the deponents; for the defendant, not being present before the magistrate when they were taken, had no opportunity to *cross-examine* them.—S. C. 1. Salk. 281. S. C. Comb. 358. S. C. Carth. 405. S. C. 1. Ld. Ray. 729. S. C. Holt, 294. 9. Co. 59. Moor, 813. 1. Sid. 270. 2. Salk. 417. 3. Bac. Abr. 496. Ld. Ray. 414. 2. Salk. 419. 12. Mod. 220. Gibb. C. E. 139. Cowp. 594.

Upon

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against
PAINE.

Upon not guilty pleaded, the case, upon the evidence, appeared to be thus :

Paine wrote the libel, it being dictated to him by another. He afterwards put it into his study, and, by mistake, delivered it to one *Brereton* instead of another paper, who transmitted a copy thereof, through several hands, to the *Mayor of Bristol*, which occasioned the mayor to send for *Brereton* to examine him, which he did upon oath, but not in the presence of *Paine*. The defendant *Paine* was afterwards examined by the mayor, and confessed, that he wrote the libel, but that he did neither * compose or publish it, but only delivered it, instead of another paper, to *Brereton* ; but it was proved, by his servant, that he sent him to his study for a writing, and that he not bringing the paper sent for, the said *Paine* fetched it himself, and being in a room only with *Dr. Hoyle* the libel was repeated, but he could not tell by whom ; but he remembered the first verse. *Brereton* was now dead.

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The question was, Whether his depositions taken before the mayor should be given in evidence at this trial ?

THE COUNSEL for the defendant insisted, that it could not be done by law, because *Brereton* being dead the defendant had lost all opportunity of cross-examining him ; that this case was not like an information before a coroner, or an examination by justices of peace of persons accused, and afterwards committed for felony, because they have power by a particular statute to take such examinations both of the fact and circumstances, and to put it in writing and certify it at the next general gaol delivery (a). But depositions of this nature are never allowed to be read as evidence in a civil cause, and much less in a criminal case (b). Before the making those statutes no single justice had power to take the information of witnesses against criminals, neither could the conservators at common law take such depositions ; they might remove or secure the disturbers of the peace, and the justices of peace now may prepare business for THE SESSIONS ; but they have no jurisdiction before the indictment found : but if at any time before the statute they had taken such examinations, they were never given in evidence against the party.

2. Hawk. P. C.
ch. 46. s. 36.

To which it was answered, that the statute makes no difference in this case, for the power of a justice of peace to take examinations is not grounded upon it ; for he might examine a criminal by virtue of his office, and the statute only enforces the execution of his office by commanding him to take such examinations ; so that if he had committed it to writing, and transmitted it to the gaol delivery, it would have been given in evidence to convict the party ; and the reason why such an examination shall be read is not by virtue of any

(a) The statutes 1. & 2. Phil. & Mary, c. 13. and the 2. & 3. Phil. & Mary, c. 10.

civil actions and criminal prosecutions as to the evidence of papers. Attorney General v. Le Merchant, 2. Term Rep. 201.

(b) There is no difference between

statute-law, but by the authority of the person before whom the oath is taken; and if such oath should be false, the party might be indicted for perjury.

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* THE COURT thereupon sent the *puisne Judge* to confer with the Justices of the Common Pleas; who returning, THE CHIEF JUSTICE declared, that it was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination.

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Then the questions arising upon the evidence to prove the defendant guilty were these:

FIRST, Whether he was the author and composer of the libel?

SECONDLY, Whether he was guilty of the publishing it?

AS TO THE FIRST POINT, there was no proof that he was the composer of it, or that he wrote it, but by his own confession before the mayor. Now if such confession shall be taken as evidence to convict him, it is but justice and reason, and so allowed in the civil law, that his whole confession shall be evidence as well for as against him (a), and then there will be no proof of a malicious and seditious publication of this paper; for he confessed that it was delivered by mistake.

If one person dictate, and another write down, a libel, both are equally the makers of it: but *quæ*. Whether a person who has a libellous writing in his possession, and reads it to a private friend in his own house, is thereby guilty of publishing it.

SECONDLY, As to his publishing it; if the evidence had come up to prove that he read it, that will not be a publication, and the writing without the publishing is no crime. It is true, my LORD COKE says (c), that where it is maliciously repeated, or where a copy of it is delivered to another, this will be a publication; but here is no proof that the defendant repeated it in the presence of *Dr. Hoyle*; for *non constat* but that *the doctor* might read it to *the parson*.

Moor, 813.
4. Com. Dig.
8vo. 716.
3. Bac. Abr.
497.
1. Hawk. P. C.
c. 73. f. 1.

THE JURY, upon consideration of the whole matter, found a special verdict, *viz.* that a certain person to them unknown did pronounce, dictate, and repeat, the words contained in the libel, which the defendant did write; and if that will make him guilty of composing and making the libel, then they find him guilty, and as to the publication thereof they find him not guilty.

This verdict was afterwards argued, that there was sufficient matter found to make the defendant guilty; for it is essential that a libel should be in writing. Words may make a malicious speech, but it is writing which makes a libel; and this agrees with my LORD COKE's definition of a libel, that it is *scriptura defamatoria* (c). * This is the first time that it became a writing, and therefore it differs from transcribing, for that must be of something in being before; but in this case, when the defendant heard the words repeated he knew they were defamatory, and he could have

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(a) 2. Hawk. P. C. ch. 46. f. 5.

(b) 5. Co. 125.

(c) 5. Co. 125.

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PAINL.

no other purpose in writing it but to perpetuate its memory; and so he made it a libel which was not so before.

IT WAS ARGUED for the defendant, That there are three things to be considered in this verdict, viz. the writing, the making, and the publication. The defendant is acquitted of the last; so that if the writing do not amount to the making and composing, then he must be acquitted of the whole. Now it cannot be said, that writing is either a making or composing what is written; for if that should be true, then a man cannot write any thing but he must be the author of it. The writing may be some evidence to a jury that he did it with an intention to publish it (a), but he is acquitted of that; so that to make the defendant guilty of this information he must be found to be a contriver, or a procurer of contriving it, which can never be by writing a copy. How far the bare act of transcribing a libel is criminal, is a matter of another consideration; it is certainly an offence, and by consequence punishable, to transcribe it; but it has been a question, Whether the writing and delivering it to the party himself is punishable by an action on the case? And it is generally held, that such an action did not lie at common law, because it is no publication to deliver a libel to the party defamed (b), which is essential to make a man guilty of it; but because it is an offence against the king, and tends to the breach of the peace, it is punishable in the court of king's bench by information at the suit of THE ATTORNEY GENERAL. Now, the reason given in the Books (c), why an action will not lie in such a case is, because the party intended to be defamed receives no injury, for he cannot be defamed where there is no publication of the libel; and the reason is the same in this case, because there was no publication; and it is the same offence to write and not to publish as to write and immediately to burn the libel.

Hob. 215.
Pop. 139.
Idem.
3. Inst. 174.

On an information for a libel, the jury must find *quo animo* it was written or published.

LASTLY, If writing or transcribing a libel is a crime, yet, as it is laid in this information, and found by the verdict, the Court cannot give judgment on it; for the jury have found it generally, that if writing is making and composing, then they find him guilty, but do not say *modo et forma*, as laid in the information; they should have found *quo animo* he did write it (d).

(a) Lamb's Case, 9. Co. 60.

(b) Dr. Wooton's Case, 12. Co.

(c) Cro. Car. 125. 1. Vent. 31.

(d) It has been frequently determined, that the only questions, on the trial of an indictment or information for a libel, for the consideration of a jury are, the fact of publishing and the truth of the *innuendoes*, and that whether the matter be or be not a libel is a question of law for the consideration of the Court, Rex v. Withers, 3. Term Rep. 428. But doubts having arisen whether it was not competent for the jury on *not guilty* pleaded to give their verdict on the whole matter in issue, it is

enacted by the 32. Geo. 3. c. 60. "That on every trial of an indictment or information for the making or publishing any libel, the jury may give a general verdict of *guilty* or *not guilty* upon the whole matter put in issue, and shall not be required or directed by the Judge to find the defendant guilty, merely on the proof of *publication*, and of the sense ascribed to the words of the libel: but it is provided, that the Judge shall, in his discretion, give his opinion and direction to the jury on the matter in issue, in like manner as in other criminal cases."

* CURIA. The making a libel is an offence, though never published; and if one dictate, and another write, both are guilty of making it. To what purpose should any one write, or copy after another, but to shew his approbation of the contents of the libel, and the better to enable him to keep it in his memory, that he may repeat it to others. Now though the bare reading a libel may not be a crime, because a man may be surpris'd, and not understand what he is about to read, yet when one takes it from another, and hears it spoken before he writes it, this cannot be by surprize, because he has time to exercise his thoughts before he writes what he hears read; so that it is not a libel by repeating, but by writing it. It does not appear upon the evidence, that this libel was ever written before; so that the defendant must be guilty of the making it, by first reducing it into writing, though probably he might not compose it. It is true, the delivering it by mistake is no publication; and if there was no other evidence against him but his own confession, the whole must be taken, and not so much of it as would serve to convict him. But when he sent his servant to his study for a paper, when he did not approve of the paper brought by the servant, but fetched another, it is not material whether it was read by *Dr. Hoyle* or not; for if that was the libel, and read by either, it is a publication. If one repeat and another write a libel, and a third approve what is wrote, they are all makers of it; for all persons who concur, and shew their assent or approbation to do an unlawful act, are guilty: so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide.

Sed adjournatur.

King against Sharp and Another.

SCIRE FACIAS AGAINST THE BAIL: to which the defendants pleaded in bar, that the principal died before the day of the return of the *capias ad satisfaciendum* against him; which might be the *alias capias*, for he does not say, "*ante return. alicujus brevis de capias, &c.*"

And upon a *special demurrer* to this plea, and this * matter being shewn for cause, for he may die before the return of the *alias capias ad satisfaciendum*, whereas the condition was broken by the return of the first *capias*;

The plaintiff had judgment, although it was insisted that this plea being in bar was good to a common intent. But THE COURT was of opinion, that the word "*alicujus*" was necessary; which being omitted the plea was ill.

Haines

THE KING
against
PAINE.

- 1. Salk. 417.
- 646.
- 1. Sid. 270.
- 474.
- 1. Mod. 58.
- Hard. 470.
- 12. Co. 35.
- 134.
- Moor, 813.
- Carth. 407.
- 2. Bl. Rep. 1037.
- 4. Com. Dig.
- "Libel" (B. 1.).
- 1. Hawk. P. C.
- ch. 73. f. 10.
- Fitzg. 47.

- 1. Hale P. C.
- 424.
- 1. Hawk. ch. 26.
- f. 2.

Case 84.

To a *scire facias* against bail, A PLEA that the principal died before the return of THE *ca. sa.* instead of ANY *ca. sa.* is bad.

- S. C. 3. Salk.
- 57.
- Jones, 29.
- 1. Salk. 8.
- 1. Mod. 5. 6.
- 1. Vent. 253.
- 6. Mod. 142.
- 8. Mod. 31.

Case 85.

Haines against Jescott.

A man cannot marry his sister's daughter, although such daughter be illegitimate.

- S. C. Comb. 356.
S. C. 1. Ld.
Ray. 68.
S. C. Com. 2.
Post. 448.
1. Inst. 683.
1. Lev. 254.
2. Vent. 9.
Vaugh. 206.
214. 302. 315.
Carth. 271.
Skin. 37.
1. Com. Dig.
"Baron and
"Feme" (B. 4).
3. Bac. Abr.
573.
2. Burn E. L.
415.
Gibson, 413.
Swinb. 95.
2. Stra. 1162.

PROHIBITION to the ecclesiastical court on a suit there against a man for marrying his sister's bastard daughter.

The reasons offered were these: This marriage is not prohibited by any law; it is not within any of the *Levitical degrees*, and such only are under the cognizance of the spiritual court; for if a marriage be not under some of those prohibitions, it is not to be impeached by any court, because it is enacted by the 32. Hen. 8. c. 38. "that all marriages contracted by lawful persons shall not be dissolved;" and such are all those who are not prohibited by God's law. Now this marriage is not prohibited by God's law, which must be intended the *Levitical law* given to THE HEBREWS, under the Mosaic dispensation; in which law there are six degrees of *consanguinity*, and seven of *affinity*, expressly forbidden.

IN CONSANGUINITY,
A man must not marry,

1. His father's sister.
2. His mother.
3. His mother's sister.
4. His sister.
5. His own daughter.
6. The daughter of his son or daughter.

IN AFFINITY,
A man must not marry,

1. His uncle's wife.
2. His father's wife.
3. His father's wife's daughter.
4. His brother's wife.
5. His wife's sister.
6. His son's wife, or his wife's daughter.
7. The daughter of his wife's son or daughter.

* [169]

* But a sister's bastard is not mentioned amongst any of these degrees. It is true, the *Levitical law* forbids a man to approach to any near of kin to uncover their nakedness; but that can never be intended of a *bastard*, because he is of kin to no person whatsoever; he is not esteemed as a *child* in our law, neither is he of sufficient consideration to raise an issue as one of the kindred of the grantor; he is *quasi nullius filius*: and therefore it is not a principal challenge to him being returned of a jury, that he is of kin to either party, because he cannot be of kin to any: so in pleading, either in a real or personal action, he cannot alledge any kindred; and nothing can be conferred upon him, but it must be by such a name which is common, and may be assumed by any other person (a). It is also true by the eighteenth canon of THE APOSTLES, that a man who married his sister's daughter *clericus non potest esse*, which is all the punishment that THE CHURCH in those days could inflict on the person so married. They had no jurisdiction or power of divorce, even in cases of incestuous marriages, and therefore could not enter into any examination of the cause. But when the parties were separated, it was by the authority of the laws to which they were locally subject; and therefore it may be a question,

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What power the spiritual court has to proceed in this matter? But it being a jurisdiction which has often been allowed, it was not disputed now, only a prohibition was prayed upon the whole matter.

HAINES
against
JESCOTT.

E contra. The plaintiff comes too late for a prohibition, for he has answered all the allegations in the ecclesiastical court, where it appeared upon proof, that the very parson who baptized the bastard married her to the plaintiff, and did not aggravate the offence to him before marriage; but he persisted in his resolution.— Now as to the *Levitical law*, it expressly prohibits that *ad proximum sanguinis sui non accedat*; and at the time when this law was established there was no difference amongst THE ISRAELITES between a child born in adultery and in lawful marriage; and therefore a bastard was *proximus sanguinis* amongst these people, who were the best expositors of that law to whom it was first promulged; and all the commentators upon this law do allow the unlawful issue to be incapable of inheriting. But though the marriage of the uncle with the niece is not forbidden by the *Levitical law* (a), yet that of the nephew with the aunt, either by the father or mother's side, is prohibited; and * so by consequence the other must be so too, because it falls under the same degree of kindred with that which is forbidden by name. It is prohibited by the *Levitical law* for a man to marry his sister's daughter; and it is no objection to say, that a bastard is not a daughter; for though she is deprived of several privileges by particular laws, yet if there be any morality in that law (which cannot be denied), it is morally as unlawful to marry a bastard as one born in lawful wedlock: and it is so also in nature, for the *Levitical law* was grounded upon a natural as well as a politick reason, to enlarge their kindred and unite their families, for there are natural as well as legal kindred; and if this shall not be expounded to fall under the prohibition that a man *ad proximum sanguinis non accedat*, then a mother may marry her bastard son.

* [170]

THE COURT inclined not to grant a prohibition;

Sed adjournatur.

(a) 2. Inst. 683.

Huffey against Jacob.

Case 85.

LONDON, } WILLIAM HUSSEY complains of *Alexander Jacob*, in custody of the marshal of the *Marshalsea* of the lord the king, being before the king himself, for that, to wit, that whereas the city of *London* in this kingdom of *England* is, and from time whereof the memory of man is not to the contrary hath been, an ancient city; and also whereas the town of *Hereford* in this kingdom of *England* is, and for all the time abovesaid hath been, an ancient town; and also whereas there is had and existeth,

Declaration on a bill of exchange against the acceptor on the custom of merchants.

S. C. 1. Salk.
344.
S. C. Ray. Ent.
and 93.

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and for all the time aboveſaid there was had and hath been, a certain ancient and laudable cuſtom uſed and approved amongſt merchants, and other perſons uſing commerce, reſiding in *Hereford* aforeſaid, and merchants and other perſons uſing commerce dwelling in *London* aforeſaid, that is to ſay, that if any merchant or other perſon reſiding in *Hereford* aforeſaid ſhould make any bill of exchange according to the cuſtom of merchants, and direct the ſame bill of exchange to another perſon uſing commerce dwelling in *London* aforeſaid, and by the ſame bill requeſt the ſame merchant or other perſon uſing commerce reſiding in *London* aforeſaid, in ſuch bill of exchange named, to whom the ſame bill of exchange ſhould be ſo directed, to pay any ſum of money in ſuch bill of exchange mentioned to any other merchant or other perſon in the ſame bill of exchange at any time in ſuch bill of exchange ſpecified, and that if ſuch merchant or other perſon dwelling at *London* aforeſaid, to whom any ſuch bill of exchange hath been ſo directed, hath accepted ſuch bill of exchange to him ſo directed as aforeſaid, according to the cuſtom of merchants, as well ſuch merchant, or other perſon to whom ſuch bill of exchange hath been ſo directed, hath been chargeable by ſuch acceptance, and for all the time aforeſaid hath been accuſtomed to be chargeable to pay ſuch ſum of money in ſuch bill of exchange mentioned, to ſuch merchant or other perſon in ſuch bill of exchange named, at the day or time in ſuch bill of exchange appointed for the payment thereof, according to the tenor and effect of ſuch bill of exchange. And whereas the right honourable the *Lord Chandois*, on the 21ſt day of *October*, in the year of Our Lord 1693, being at *Hereford* aforeſaid, and uſing commerce, that is to ſay, at *London* aforeſaid, in the pariſh of the *Bleſſed Mary of the Arches*, in the ward of *Cheape*, made his firſt bill of exchange bearing date the ſame day and year, and directed the ſame bill of exchange to the aforeſaid *Alexander Jacob*, then reſiding and dwelling and uſing commerce at *London* aforeſaid, in the pariſh and ward aforeſaid; and by the ſame bill of exchange the aforeſaid *Lord Chandois* requeſted the aforeſaid *Alexander Jacob* to pay within a month after ſight of his firſt bill of exchange the ſum of one hundred and twenty pieces of gold, called guineas, to the aforeſaid *William Huſſey*, by the name of *Captain Huſſey*, the aforeſaid *Lord Chandois* and *William Huſſey* then and there uſing commerce; and the ſaid *William* afterwards, on the 28th day of the ſame month of *October*, in the year aboveſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, did ſhew the ſaid bill of exchange to him the ſaid *Alexander*, and then and there requeſted the ſaid *Alexander* to accept the ſaid bill of exchange, and to pay to him the ſaid *William* the ſaid one hundred and twenty pieces of gold, called guineas, according to the tenor of the bill aforeſaid, and thereupon the ſaid *Alexander* then and there upon ſight thereof accepted the ſaid bill of exchange, according to the cuſtom of merchants aforeſaid, by reaſon of which ſaid acceptance of the ſaid bill of exchange, and by reaſon of the premiſes, he, the ſaid *Alexander*, according to the cuſtom aforeſaid ſo uſed and approved

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approved as aforesaid, became chargeable to pay to the aforesaid William the said one hundred and twenty pieces of gold in the said bill of exchange mentioned, according to the form and effect of the said bill; and the aforesaid Alexander afterwards, to wit, the day and year last mentioned, at London aforesaid, at the parish and ward aforesaid, in consideration of the premises aforesaid assumed upon himself, and to the said William then and there faithfully promised, that he the said Alexander the said one hundred and twenty pieces of gold, called guineas, in the said bill of exchange mentioned, would well and faithfully pay and satisfy to the said William, according to the form and effect of the said bill of exchange. And also whereas the aforesaid Alexander afterwards, on the first day of December, in the year of Our Lord 1693, at London aforesaid, in the parish and ward aforesaid, was indebted to the said William in other one hundred and twenty pieces of gold, called guineas, of the value of one hundred and thirty-two pounds of lawful money of England, for so much money by him the said William for the said Alexander, at the special instance and request of him the said Alexander, before that time paid, laid out, and disbursed; and being thereof so indebted, the aforesaid Alexander, in consideration thereof, assumed upon himself, and to the said William then and there faithfully promised, that he the said Alexander would well and faithfully pay and satisfy to him the said William the said one hundred and twenty pieces of gold, called guineas, of the value of the one hundred and thirty-two pounds last mentioned, when he should be thereunto requested. And also whereas the said Alexander afterwards, to wit, on the said first day of December, in the year last above said, at London aforesaid, in the parish and ward aforesaid, was indebted to the said William in other one hundred and thirty-two pounds of lawful money of England, for so much money by the said William to the said Alexander, at the special instance and request of him the said Alexander, before that time lent and advanced; and being so indebted, the said Alexander, in consideration thereof, assumed upon himself, and to the said William then and there faithfully promised that he the said Alexander would well and faithfully pay and satisfy to the said William the said one hundred and thirty-two pounds last mentioned, when he should thereunto be required. And also whereas the said Alexander afterwards, to wit, on the said first day of December, in the year last above said, at London aforesaid, in the parish and ward aforesaid, was indebted to the said William in other one hundred and twenty pieces of gold, called guineas, of the value of one hundred and thirty-two pounds of like lawful money of England, for the like sum of money by the said Alexander for the said William, and to the use of him the said William before that time had and received; and being thereof so indebted, the said Alexander, in consideration thereof, assumed upon himself, and to the said William then and there faithfully promised that he the said Alexander would well and faithfully pay and satisfy to the said William the said one hundred and twenty pieces of gold, called guineas, last mentioned, when he should be thereto requested:

* [172]

Indebtedness of
sumpt for mo-
ney laid out.

The like for mo-
ney lent.

The like for mo-
ney had and re-
ceived to the
plaintiff's use.

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HUSSEY
agrost
JACOB.

Breach of the
first promise.

And of the other
three promises.

* [173]

Impar lance.

General issue to
the second, third,
and fourth
counts.

Plea as to the
first count.

Protestando that
Lord Chandos
was not a mer-
chant;

and that the
plaintiff was not
a merchant.

The statute 14.
Car. 2. against
gaming, pleaded,
that the bill was
given for money
lost at hazard by
Lord Chandos to
the plaintiff.

nevertheless the said *Alexander*, not at all regarding his said several promises and undertakings in form aforesaid made, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *William* in this behalf, hath not paid to the said *William* the said one hundred and twenty pieces of gold, called guineas, in the said first promise abovementioned, at a month after sight of the said bill of exchange abovementioned, or the said several sums of money in the said second, third, and fourth promises, although to pay the said several sums of money in the said second, third, and fourth promises abovementioned, to him the said *William*, the said *Alexander* afterwards, to wit, on the tenth day of *April*, in the year of Our Lord 1694, and often afterwards, at *London* aforesaid, in the parish and ward aforesaid, was requested by the said *William*, but hath hitherto wholly refused, and yet doth refuse, to pay the same to him, whereupon the said *William* saith that he is injured, and hath damage to the value of four hundred pounds, and thereupon he brings suit, &c. And now here at this day, to wit, *Friday* next after the morrow of the *Holy Trinity*, in this same Term, until which day the said *Alexander* had leave to imparl to the said bill, and then to answer before the lord the king at *Westminster*, come as well the said *William* by his said attorney as the said *Alexander* by *Vincent Skynes* his attorney; and the said *Alexander* defends the force and injury when, &c. and as to the second, third, and fourth promises and undertakings in the said declaration abovementioned, the said *Alexander* saith, that he did not assume upon himself in manner and form as the said *William* above complains against him; and of this he puts himself upon the country, and the said *William* thereof likewise: and as to the said first promise and undertaking, in the said declaration abovementioned, the said *Alexander* saith, that he, by virtue of the said bill of exchange in the first promise and undertaking abovementioned by him as aforesaid made, ought not to be charged, because protesting that the said *Lord Chandos* at the said time of making the said bill of exchange, or at any time afterwards, was not a person using commerce; protesting also, that the said *William*, at the said time of making the said bill of exchange, was not a person using commerce, as the said *William* by his said declaration above supposes; nevertheless the said *Alexander* for plea saith, that after the twenty-ninth day of *September*, in the year of Our Lord 1664, and before the making the said bill of exchange, to wit, on the twenty-first day of *October*, in the year of Our Lord 1693 aforesaid, at *London* aforesaid, in the parish and ward aforesaid, the said *Lord Chandos* and *William* played between themselves with dice at a certain game called hazard, and that the said *Lord Chandos* then and there at that game, at one time and at one meeting, lost to the said *William* the abovementioned sum of one hundred and twenty pieces of gold, called guineas, and that for securing the payment of the said one hundred and twenty pieces of gold lost by him the said *Lord Chandos* to the said *William* as aforesaid, he the said *Lord Chandos* afterwards, to wit, on the said twenty-

twenty-first day of *October*, in the year of Our Lord 1693 above said, at the parish and ward afore said, directed his first bill of exchange to the said *Alexander*, and by the same bill of exchange the said *Lord Chandois* requested him the said *Alexander* to pay at a month after sight of the said bill of exchange the said sum of one hundred and twenty pieces of gold, called guineas, to the said *William*; and afterwards, to wit, on the said twenty-eighth day of *October*, in the year last above said, upon sight of the said first bill of exchange, he, the said *Alexander*, at *London* afore said, in the parish and ward afore said, accepted the said bill of exchange for the payment of the said one hundred and twenty pieces of gold, and assumed upon himself, as the said *William* by the declaration afore said above hath supposed; by reason of which premises, and by force of the statute in that case made and provided, the said first bill of exchange by him the said *Alexander* as afore said accepted, and the acceptance thereof, and the promise and undertaking of him the said *Alexander*, by him the said *Alexander* as afore said made, became and were, and now are, void and of no force in law; and this he is ready to verify; wherefore he prays judgment, if he by virtue of the bill of exchange afore said by the afore said *Lord Chandois*, against the form of the statute afore said as afore said given and made, and by him the said *Alexander* in form afore said accepted, ought to be charged, &c. And the said *William* saith, that he, by anything by the said *Alexander* above in pleading alledged, as to the first promise and undertaking afore said, ought not to be barred from having his said action thereof against him the said *Alexander*, because he saith, that the plea afore said, by the said *Alexander* in manner and form afore said above pleaded, and the matter in the same contained, are not sufficient in law to preclude him the said *William* from having his said action thereof against the said *Alexander*; to which said plea he the said *William* hath no necessity, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify: wherefore for want of a sufficient answer in this behalf, he the said *William* prays judgment and his damages, by occasion of the non-performance of the said first promise and undertaking, to be adjudged to him, &c. And for cause of demurrer in law in this behalf, according to the form of the statute in that case made and provided, he the said *William* sheweth, and to the court here demonstrates, these causes following, that is to say, that the plea afore said amounts only to the general issue, and also is double, perplexed, uncertain, and wants form, and also is no answer to the declaration afore said. And the said *Alexander* saith, that the plea afore said by him the said *Alexander*, as to the first promise and undertaking in manner and form afore said above pleaded, and the matter in the same contained, are good and sufficient in law to bar him the said *William* from having his said action thereof against him the said *Alexander*; which said plea, and the matter in the same contained, he the said *Alexander* is ready to verify and prove, as the court, &c. And because the said *William* hath not answered to that plea, nor hitherto in any manner denied it, he the said *Alexander*, as before, prays judgment,

Hussy
against
Jaco.

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Demurrer,

Joinder in demurrer.

HUSSEY
against
JACOB.

Venue awarded
as well to try the
issue as to en-
quire of damages
if judgment be
for plaintiff on
the demurrer.

* [175]

and that the said *William* may be barred from having his said action thereof against him the said *Alexander*, as to the said first promise and undertaking, &c. But because the court of the said lord the king now here is not yet advised of their judgment to be given of and upon the premises, day thereupon is given to the parties aforesaid before the lord the king at *Westminster*, until ——— next after ———, to hear their judgment of and concerning the premises, for that the court of the said lord the king is not yet, &c. And as well to try the issue aforesaid, between the parties aforesaid, above joined by the country to be tried, as to inquire what damages the said *William Hussey* hath sustained by occasion of the premises aforesaid, whereupon the parties aforesaid have put themselves upon the judgment of the court, if judgment thereupon shall happen to be given for the said *William* against the said *Alexander Jacob*, let a jury thereupon come before the lord the king at *Westminster* at the said day, and who neither, &c. to take cognizance, &c. because as well, &c. The same day is given to the parties aforesaid there, &c.

Cafe 86.

Hussey against Jacob.

To an action brought by the *payee* against the *acceptor* of a bill of exchange for 120*l*. A PLEA that the *drawer* and the *plaintiff* played at HAZARD; that the *drawer* lost at one time and meeting the said 120*l*; and that the bill was drawn and accepted as a *security* for the money so lost; and that by 16. Car. 2. c. 7. all securities whatsoever for monies above 100*l*. lost at one time upon tick, are void, is good, for such plea does not amount to the *general issue*; and the defendant has election to give it in evidence under that issue, or to plead it specially.—See *Str.* 1155. *S. C.* 1. *Salk.* 344. *S. C.* *Carth.* 356. *S. C.* *Holt*, 328. *S. C.* 12. *Mod.* 96. *S. C.* *Com.* 4. *S. C.* 1. *Ld. Ray.* 87. *S. C.* 3. *Ld. Ray.* 136. *Ante*, 4. *Post.* 351. 2. *Mod.* 54. 4. *Mod.* 409. 1. *Lutw.* 484. *Str.* 1155. 1249. 4. *Com. Dig.* “Justice of Peace” (B. 42.). 4. *Bac. Abr.* 65. 2. *Burr.* 1080. 1. *El. Rep.* 245. 2. *Ter. Rep.* 439.

THIS was an action on the case brought upon a bill of exchange against the acceptor, wherein the plaintiff sets forth, that the bill was drawn by my Lord *Chandois* upon the defendant, for the payment of one hundred and twenty guineas to the plaintiff. Then he sets forth the custom of merchants, and that both the drawer, the plaintiff, and the acceptor, were persons using trade and merchandizing, and that the defendant had not paid the money, &c.

The defendant, by PROTESTATION, says, that neither my Lord *Chandois* or the plaintiff were persons using merchandize at the time when the bill of exchange was drawn, or at any time afterwards. Then he pleads, that after the making the statute 16. Car. 2. c. 7. of Gaming, and before the said bill was given, my Lord *Chandois* and the plaintiff did play at dice, at a game called HAZARD; and that my lord at one time and meeting did lose one hundred and twenty guineas to the plaintiff; and that, for securing the payment thereof, he did draw the bill of exchange upon the defendant, who accepted the same; and that, by virtue of the said statute 16. Car. 2. c. 7. the acceptance was void in law.

The plaintiff demurred specially, and shewed for cause, that this plea amounts to the *general issue*, and no more.

The defendant joined in demurrer.

For the better understanding this case it may be necessary to state, that some part of the statute 16. Car. 2. c. 7. enacts, “That if any
“ person

"person shall play other than for ready money, and shall lose above one hundred pounds at one time upon ticket or credit, the loser shall not be bound to pay it; but the contract for the same, and all judgments, &c. and other acts and deeds, and securities whatsoever for such money, shall be void."

HUSSEY
against
JACOB.

Those who argued against this plea said,

FIRST, That the statute of Gaming cannot be pleaded to this action, because it is no answer to the *custom of merchants*; so that the declaration is true notwithstanding this plea.

* SECONDLY, It is not alledged that the money was lost upon ticket or credit, or that it was not paid down at that time when it was lost; for in such cases only the contracts are void. Now by this way of pleading the defendant has not so much as brought himself within the purview of the statute, which was made against deceitful, disorderly, and excessive gaming, and therefore shall not have the benefit of the consequential part of the law, which is the avoidance of the contract. But this statute does not hinder the plaintiff from his action, because he being a third person, and not concerned in the gaming, may promise the payment of the money upon a good consideration. As if a man lose above a hundred pounds at one sitting, and give judgment for the payment, and a third person promises the winner, in consideration he will not take out execution within a year, that he will pay the money, this is a good promise, and will bind him, because it may have a reasonable beginning; for probably the loser would not plead to the *scire facias*, or take any advantage of the statute. So if *A.* win above one hundred pounds of *B.* and at the same time is indebted to *C.* in the like sum, and then both *A.* and *B.* become bound to *C.* for the payment of the money, it is a good bond, and not to be avoided by the statute. This action being brought against the acceptor, he must now answer upon a supposed contract of his own, and not upon a joint contract with another; for every indorser undertakes severally for himself, and the defendant in this case has undertaken to pay the sum in demand upon a subsequent contract made by himself. Possibly my Lord Chandois might have taken advantage of the statute, but the defendant cannot; for his undertaking being subsequent to the gaming, is neither within the intent or letter of the law.

Carth. 269.
1. Salk. 124.
Comb. 4. 32.
152. 452.
Skin. 255. 343.
410.

THIRDLY, It is not averred in the plea, that the plaintiff *Hussey* did accept the bill for securing the payment of the money lost at play; and without such averment it is not within the meaning of the statute.

* *E contra.* FIRST, To the custom of merchants, it need not be answered, as it is set forth in the declaration; for there is special matter enough, which alters the custom. It is true, there is a bill set forth, which is alledged to be drawn according to the custom of merchants, but with this impediment, that it was drawn as a security for the payment of money won at play, which bill ought not to

[177]

Hilary Term, 7. Will. 3: In B. R.

HUSKRY
against
JACOB.

be taken by law ; so that though the custom is admitted, it is avoided by an act of parliament.

As to THE SECOND OBJECTION, the plea is, that *Jacob* did accept the bill for the sum for which it was drawn, which was for money won at play ; it is a *contract* for the payment of such money, which is void by the statute.

As to THE THIRD OBJECTION, If this should not be within the statute, because it is a new undertaking, then it would be easily eluded by getting one to be bound for the money lost at play, which is a new undertaking for the payment ; and so the statute would be of very little use.

g. Show. Dixon
v. Thompson.

FOURTHLY, As to the exception, that it is a plea which amounts to the general issue ; a man in many cases may plead *special matter* to avoid the plaintiff's action, though he might give it in evidence upon the *general issue* ; as in debt upon a bond against a *feme covert*, she may plead *coverture*, or give it in evidence upon *non est factum*. The law here pleaded is consistent with the action brought against the defendant, which he has confessed, but has also shewed *special matter* to avoid it. It cannot be denied, but that if the action had been brought against my *Lord Chandois*, the drawer, upon the refusal of *Jacob* to pay it, my lord might have taken advantage of the statute, which is an argument that the defendant shall also take the same advantage, because his new contract stands upon the former consideration, and it is but a farther security for the same money lost at play ; and his acceptance of the bill is an express promise to pay it. Now this gaming must be either upon tick or for ready money ; but it is plain it could not be for ready money, for then the loser would not have drawn this bill for the payment of it.

4. Bac. Abr. 62.

Carth. 356.

Whereupon judgment was given for the defendant (a).

(a) See now the 9. Ann. c. 14.

Cafe 87.

Wilson against Howard.

A declaration in
trespass for tak-
ing four loads of
wheat, with a
continuando.

* [178]

HERTFORD, } EDWARDUS WILSON nuper de villa
to wit, } SANCTI ALBANI in com. præd. innholder,
attach. fuit ad responden. JOHANNI HOWARD de placito quare
vi et armis, &c. domum ipsius * JOHANNIS HOWARD apud villam
SANCTI ALBANI præd. fregit et intravit et bona et catalla sua ad
valentiam decem librarum adtunc et ibidem nuper invent. cepit et
asportavit et alia enormia ei intulit ad grave damnum ipsius
JOHANNIS HOWARD et contra pacem domini regis nunc, &c.
Et unde idem JOHANNES per JOHANNEM LEIGH attorn. suum quæ-
ritur quod EDWARDUS WILSON vicesimo septimo die Octobris an-
no regni domini regis nunc, &c. vi et armis, &c. domum ip-
sius JOHANNIS HOWARD apud villam SANCTI ALBANI præd.
fregit et intravit et bona et catalla sua VIDELICET viginti modios,

ANGLICE

Hilary Term, 7. Will. 3. In B. R.

ANGLICE "four loads," tritici ipsius JOHANNIS WILSON ad valentiam, &c. adtunc et ibidem nuper invent. cepit et asportavit totam transgressionem præd. a prædicto vicesimo septimo die Octobris anno regni dicti domini regis septimo supradicto usque decimum septimum diem Novembris tunc prox. sequen. diversis diebus et vicibus CONTINUANDO et alia enormia ei intulit ad grave damnum ipsius JOHANNIS HOWARD et contra pacem, &c. unde dicit quod deteriorat. est et damnum habet ad valentiam viginti librarum et inde producit sectam, &c.

WILSON
against
HOWARD.

Wilson against Howard.

Case 81.

TRESPASS for taking four loads of wheat, with a *continuando* for a whole month. There was judgment in the common pleas by *nil dicit*, and a writ of error brought: and the errors assigned were,

FIRST, That the words "*viginti modios tritici*, ANGLICE "four loads of wheat," are insensible; for *modius* signifies a bushel, and it is not possible to make four loads of twenty bushels.

To which it was answered,

FIRST, The ANGLICE is void, and then the *viginti modios tritici* may be well understood.

SECONDLY, It was objected, that the trespass is for breaking the plaintiff's house, with a *continuando totam transgressionem* for a month; which cannot be, for a man must have some time to rest.

To which it was answered, that the *continuando* shews the taking was not all at the same time, like the case in THE YEAR-BOOK (a), where trespass was brought for taking his goods, viz. two loads of wheat, with a *continuando diversis diebus et vicibus*, from such a day to such a day; and held good: for a trespass may * be done in taking such a quantity of goods which cannot be removed in one day, and therefore the *continuando* is to shew how it was done (b). Besides, where a *continuando* is not well laid, and entire damages given, it shall be intended for that only which can have a continuance (c).

And so was the opinion of THE COURT in this case; for the taking the corn is laid to be on such a day *continuando transgressionem præd.* from that day to such a day, which is insensible, and so damages could not be given for that; and a *continuando* may be laid *quoad fractionem domus* as well as *pedibus ambulando*. But of that it was doubted; for if it had been *continuando transgressionem præd.* generally, it had been well enough; but it is *totam transgressionem*, which cannot be for breaking a house.

(a) Year Book 21. Hen. 6. pl. 43. 4.
2. Roll. Abr. 549.

(b) 2. Mod. 253. 6. Mod. 38. 2. Salk. 638.
(c) Yelv. 126.

In trespass for *viginti modios tritici*, ANGLICE four loads of wheat, the ANGLICE shall be rejected.

Cro. Jac. 129.
2. Roll. Abr. 254.
1. Sid. 183.
3. Lev. 336.
Skin. 42. 641.

1. Sid. 319.
1. Lev. 210.
6. Mod. 38.
2. Salk. 638.

Trespass for breaking the plaintiff's house and taking his corn, with a "*continuando totam transgressionem* for a "month," is good.

* [179]

2. Roll. Abr. 545. 549.
1. Sid. 319. 253. 224.
1. Vent. 264.
Salk. 639.
Comb. 193. 377. 427.
3. Mod. 110.
8. Mod. 40.
1. Lev. 210.

There

Treſſa's for tak-
ing goods "then
"and there laſtly
"found," is not
erroneous.

There was ANOTHER OBJECTION, viz. that the defendant
bona et catalla adtunc et ibidem nuper invent. cepit, &c. which
cannot be at one and the ſame time.

To which it was answered, that the word *nuper* relates only to
the time of declaring, but the time is not material, for he can give
in evidence but on taking.

THE JUDGMENT was affirmed.

Cafe 89.

The King againſt Commings and Another.

An indictment
lies againſt over-
ſeers for reſuſ-
ing to account within
the time limited
by 41. Eliz. c. 2.
ſed quere.

S. C. 3. Salk.

287.

S. C. Comb. 274.

Anſw. 96.

2. Salk. 175.

380.

2. Salk. 525.

531.

6. Mod. 86. 96.

4. Com. Dig.

"Indictment"

(E.).

2. Conſt's Bott,

294.

4. Ter. Rep. 246.

BY 43. Eliz. c. 2. f. 2. "The churchwardens and overſeers, or
" ſuch of them as ſhall not be let by ſickneſs or other juſt
" excuſe, to be allowed by two juſtices of the peace, ſhall, within
" four days after the end of their year, and after other overſeers
" nominated, make and yield up to two juſtices of the peace
" true and perfect accounts of all ſums of money by them received,
" or rated and ſeſſed and not received, &c. upon pain that every
" one of them ſhall forfeit twenty ſhillings; which may be levied
" by diſtreſs by warrant of two juſtices; and in deſect of ſuch
" diſtreſs two juſtices may commit him or them to the common
" gaol of the county, there to remain without bail or mainprize
" until payment of the ſaid ſum and arrearages."—And by the
fourth ſection it is enacted, "That two juſtices ſhall and may
" commit to the ſaid priſon every one of the ſaid churchwardens and
" overſeers which ſhall reſuſe to account, there to remain without
" bail or mainprize until he have made a true account, and ſatiſ-
" fied and paid ſo much as upon the ſaid account ſhall be remain-
" ing in his hands (a)."

THE DEFENDANTS were indicted at the ſeſſions, for that they
being choſen overſeers of the poor of the pariſh of *Lynn* for the
year 1693, and having taken upon them that office, they, *et uterque*
eorum, did collect and receive ſeveral ſums of money for the relief
of the poor, and did reſuſe to account within four days after the end
of the ſaid year, and, after other overſeers were nominated, to give an
account to two juſtices of the peace of the ſums by them received,
and to deliver over the ſame to the new overſeers, but converted it
to their own uſe, and did uſe *other fraudulent practices* to deceive
the poor, &c. *contra formam ſtatuti, &c.*

This indictment was removed into the court of king's bench by
certiorari; and the exceptions to it were,

FIRST, That an indictment will not lie for this offence; for
it is grounded on an act of parliament, which appoints the over-
ſeers to account, and provides a puniſhment for reſuſing, viz.
to be committed by two juſtices of the peace "till they account,

(a) By 17. Geo. 2. c. 7. "The over-
" ſeers ſhall, within fourteen days after
" other overſeers are appointed, deliver
" in their accounts to ſaid overſeers, and
" pay the balance, which accounts ſhall
" be veriſied on oath; and if they do not
" account as the act directs, two juſtices
" may commit them to the common
" gaol until they ſhall account and pay
" the balance."

"and

"* and pay what remains in their hands, there to remain without bail." So that this being an offence made by a particular statute, which was not so at common law, and directing how the offender shall be punished, that must be the remedy, and no other can be pursued.

THE KING
against
COMMINGS
AND
ANOTHER.

THE COURT. The overseers are required by the 43. Eliz. c. 2. f. 2. to account, and their refusal is a contempt of the law, for which they may be indicted: and as to that, there is no difference when a thing is *enjoined* and when it is *prohibited* by a statute; for when it is prohibited, the party shall not only have his action for the injury done, but the offender shall be punished at the king's suit for the contempt of his law. It is true, two justices of peace have power to commit the overseers refusing to account, which is a proper means to come at the right; but it does not satisfy the king for the contempt (a).

SECONDLY, If an indictment will not lie for this offence as set forth, it will not for the *other fraudulent practices* mentioned in it, because it is too general (b). And so it has been adjudged in like cases, viz. Where a man was indicted for being a *common misdoer* (c), it was held void without laying some particular offence.

An indictment
for fraudulent
practices is too
general.

THIRDLY, It is said, that "being overseers of the parish of *Lynn* they did collect several sums, &c.;" but they have laid no *venue* where the money was collected, neither is it mentioned what sums were received.

Indictment
against overseers
for not account-
ing, need not
state how much
money was col-
lected.

Carth. 256.

As to THE OBJECTION, that the indictment does not set forth what sums were collected, it is not material, for the offence is for not accounting.

FOURTHLY, Two are indicted; and it is said, "that they *et uterque eorum* did receive money, which they had not brought to account." This is likewise void for the uncertainty, because the act of one is not the act of the other; as where four were indicted for using a trade *contra formam statuti* (d), setting forth, "that they *et uterque eorum*" did use the trade, it was quashed for this reason, for the using of one cannot be the using of the other (e).

An indictment
against OVER-
SEERS, charging
that THEY and
each of them re-
ceived money
without bring-
ing it to account,
is good.

* THE COURT. Though it be true, that two cannot be indicted for refusing to become *apprentices*, because the service of one cannot be the service of the other, yet two may be indicted for a *cheat* (f), and for several other offences.

* [181]

2. Roll. Ab. 81.
2. Hawk. P. C.
ch. 25. f. 89.
Fitzg. 56.

Adjournatur.

(a) The Court doubted upon this point of the case, S. C. 3. Salk. 187.; but said, that an indictment at sessions seems to be within the statute, S. C. Comb. 373. And the Court has refused on motion to quash an indictment against overseers for not paying over money to their successors. Rex v. King, 2. Stra. 1268.

(b) See Rex v. Mason, 2. Term Rep. 581.

(c) 2. Roll. Abr. 79.

(d) 2. Roll. Abr. 81.

(e) Salk. 382. 2. Sess. Cases, 221. Stra. 623. 2. Ld. Ray. 1248.

(f) See Benfield v. Saunders, 2. Burr. 980.; Rex v. Young, 3. Term Rep. 98.

Littleton

Case 90.

Littleton against Cole.

A declaration for negligently keeping a fire, by which the plaintiff's house was burned,

viz. in parietibus, partitionibus, ornamentis, &c. is good.

Ante, 87.
Post. 324.

5 Co. 13.
Cro. Eliz. 777.

724.
Show. 310.

4 Mod. 9.
Skin. 242.

Comb. 306.
5 Com. Dig.

"Pleader"
(2 P. 3.).

AN ACTION ON THE CASE was brought for negligently keeping his fire, by reason whereof the plaintiff's house was burned, *viz. in parietibus, in partitionibus fenestris, in operibus ferrariis, et ornamentis ejusdem domus.*

And upon demurrer this exception was taken to the declaration: That it was too general and uncertain, for damages could not be given for the walls and ornaments of the house; as where trespass was brought for taking *diversa genera apparatusum* (a), or trover for goods *cum aliis implementis et necessariis* (b), not shewing what they are, and was held ill after a verdict, for the Court cannot give judgment for such uncertain parcels (c).

It was argued for the plaintiff, that the action had been well brought without the *videlicet*, for the enumerating the particulars was but matter of aggravation and inference; and this being an action wherein damages are to be recovered, they may be divided, and the plaintiff ought to recover for that which is well laid in the declaration, and that is, for negligently keeping his fire (d).

The plaintiff had judgment.

(a) Allen, 9.

(b) Cro. Eliz. 817.

(c) Salisbury v. Proctor, Post. 324.

(d) By 6. Ann. c. 31. l. 6. "No action, suit, or process whatsoever shall be had, maintained, or prosecuted against

"any person in whose house or chamber

"any fire shall accidentally begin, or any

"recompence be made by such person

"for any damage suffered or occasioned

"thereby."

EASTER

E A S T E R T E R M,

The Eighth of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

* Chamberline against Harvey.

* [182]

Cafe 91.

Michaelmas Term, 7. Will. 3. Roll. 123.

LONDON, } **B**E it remembered, that on *Wednesday* next after *Count intrepas*
to wit. } three weeks of *Saint Michael* in this same *for a negro slave.*
Term, before the lord the king at *Westminster* came *Willoughby* S. C. 3. Ld.
Chamberline, Esq. by *Godfrey Woodward* his attorney, and brought Ray. 129.
here into the court of the said lord the king then there his certain
bill against *Robert Harvey, Esq.* in custody of the marshal, &c,
of a plea of trespass; and there are pledges of prosecuting, to wit,
John Doe and *Richard Roe*; which said bill follows in these
words, to wit, *London, to wit, Willoughby Chamberline, Esq.*
complains of *Robert Harvey, Esq.* in custody of the marshal of
the *Marshalsea* of the lord the king, being before the king himself,
for that the said *Robert*, on the first day of *September*, in the year
of Our Lord 1695, with force and arms, one negro of him the
said *William*, of the price of one hundred pounds of lawful money
of *England*, at *London*, aforesaid, to wit, in the parish of the
blessed Mary of the Arches in the ward of *Cheape*, took and led
away from him, and then and there detained and kept possession of
the negro aforesaid from the said first day of *September* until the
exhibiting of this bill, so that he the said *Willoughby* totally was
without,

CHAMBER-
LINE
against
HARVEY.

without, and lost the use and benefit of the said negro for the whole time aforesaid, and other wrongs to the said *Willoughby* then and there did, against the peace of the said lord the now king; to the damage of him the said *Willoughby*, of one hundred and fifty pounds, and thereupon he brings suit, &c.

Not guilty.

And the said *Robert*, by *Robert Stone* his attorney, comes and defends the force and injury when, &c. and saith, that he is not thereof guilty in manner and form as the said *Willoughby* above complains against him; and of this he puts himself upon the country, and the said *Willoughby* thereupon likewise: therefore let a jury thereupon come before the lord the king at *Westminster* on *Thursday* next after the morrow of *All Souls*; and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid there, &c. Afterwards the process thereupon is continued between the parties aforesaid in the plea aforesaid, by the jury being respited thereupon between them, before the lord the king at *Westminster* until *Thursday* next after fifteen days of *Saint Martin*, unless the lord the king's trusty and well-beloved *John Holt*, Knight, Chief Justice of the lord the king, assigned to hold pleas in the court of the said lord the king himself, shall before come on *Wednesday* next after fifteen days of *Saint Martin* at *Guildhall*, *London*, by form of the statute, for want of jurors, &c. At which day, before the lord the king at *Westminster*, cometh the said *Willoughby* by his said attorney, and the said Chief Justice before whom, &c. hath sent here his record before him had in these words: Afterward, on the day and at the place within contained, before *John Holt*, Knight, Chief Justice of the lord the king, assigned to hold pleas in the court of the said lord the king before the king himself, come as well the within-named *Willoughby Chamberline*, Esq. as the within-written *Robert Harvey*, Esq. by their attorneys within contained; and the jurors of the jury, whereof mention is within made, being called, certain of them, to wit, *Thomas Sericole*, *Richard Martin*, *Samuel Stone*, *Benjamin Hodgson*, *Jeremiah Barratt*, and *Nathaniel Spinlow*, came, and are sworn upon that jury; and because the rest of the jurors of the same jury did not appear, therefore others of the by-standers, by the sheriffs of *London* aforesaid, being chosen to this, at the request of the said *Willoughby Chamberline*, and by the command of the chief justice aforesaid newly appointed, whose names are assiled in the panel within written, according to the form of the statute in such case made and provided; and the jurors so newly appointed, to wit, *Thomas Pool*, *Richard Martin*, *Thomas Ward*, *John Watson*, *Philip Brewster*, and *Richard Chauncey*, being called likewise come, who being chosen, tried, and sworn to speak the truth concerning the matter therein contained, together with the other jurors aforesaid before impanelled and sworn, say upon their oath, that one *Edward Chamberline*, long before the within-written time when, &c. was seized of a certain plantation in the island of *Barbadoes* in the *West Indies*, in parts beyond

Nisi prius.

Postea.

*Tales de circum-
stantibus.*

Special verdict.

Easter Term, 8. Will. 3. In B. R.

beyond the seas in his demesne as of fee, and of certain negro slaves, being slaves belonging and appertaining to the same plantation; and the aforesaid negro slave, long before the within-written time when, &c. was born within the island aforesaid of negro parents, slaves belonging and appertaining to the same plantation; and that long before the within-written time when, &c. to wit, on the twenty-ninth day of *April*, in the year of our Lord 1668, by one *William Willoughby*, deputy governor, council and assembly, being the representatives of that island in that behalf lawfully authorized and commissioned at the island aforesaid, it was enacted in these *English* words following, *Barbadoes*, An act declaring the negro slaves of this island to be real estates: Whereas a very considerable part of the wealth of this island consists in our negro slaves, without whose labour and service we shall be utterly unable to manage our plantations here, thereby relieving our wants, and bringing that considerable increase of revenue which this place affords to his majesty's coffers, as well here as in *England*; and whereas some law-suits have risen, and other great inconveniencies have followed, where divers persons dying intestate have left their right and interest of their negro slaves to be by law disputed between their heirs, executors, and administrators, wherein the various judgments and affections of several courts or jurors have sometimes found for one, and at other times for the other; for a full remedy of these inconveniencies, and to the intent that the heirs and widow who claim dower may not have bare lands without negroes to manure the same, and also that the condition, right, and interest of negroes to all other ends and purposes may be fully known and determined, the deputy governors, council, and assembly, being willing that all ambiguities herein should be removed, and the law in this case be declared and put in a certainty, have ordained and enacted by the deputy governor, council, and assembly, and by the authority of the same, that from and after publication hereof, all negro slaves, in all courts of judicature and other places within this island, shall be held, taken, and adjudged, to be estates real, and not chattels, and shall descend unto the heir or widow of any person dying, according to the manner and custom of lands of inheritance held in fee-simple; provided always, that no person selling or alienating any of his or her negroes, is hereby held or obliged to cause such sale or alienation to be inrolled, as is accustomed to be done and required by the laws of this island, as in all other real estates; any usage, custom, or law, to the contrary notwithstanding. Provided this act, or any-thing therein contained, shall not be taken and deemed to extend unto any merchant, factor, or agent, bringing negro slaves to this island, and having the consignments of any slaves under them, but that in all respects they, their executors, administrators, or assigns, may hold, possess, and enjoy, such slaves or negroes in such condition as they might have done before the making of this act, until sale of such slave or slaves hath been made in the island, as by that act more fully appears. And that the said

Edward

CHAMBER-
LAIN
against
HARVEY.

CHAMBER-
LINE
against
HARVEY.

Edward Chamberline, long before the said time when, &c. at the island aforesaid died seised of his like estate, of and in the plantation and negro slaves aforesaid thereunto belonging; by and after whose death, one third part of the plantation and negro slaves aforesaid, whereof the negro in the declaration aforesaid mentioned was one, descended to *Mary*, the widow and relict of the said *Edward Chamberline*, in the name of her dower, by the laws of the island aforesaid; and the reversion of the said third part descended to the said *William Chamberline*, as the son and heir of the said *Edward*; and being so seised, the said *Mary* afterwards, and long before the time when, &c. took for her husband one *John Witham*, *Knt.* by which the said *John Witham* was seised in right of his said wife of one third part of the plantation and negro slaves for the term of the life of his said wife; and the said *John Witham* being so seised, the within-named negro, a true native, long before the within-written time when, &c. to wit, in the thirty-sixth year of the reign of *Charles* the Second, late king of *England*, brought within this kingdom of *England*, and afterwards, the said negro slave above-mentioned remained in the service of him the said *John* within this kingdom of *England* for the space of divers years, from that time and before the said time when, &c. according to the rites of the church of *England*, but without the knowledge or consent of the said *Willoughby Chamberline*, there was baptized; and that the said *John Witham* afterwards, and after the death of his said wife, but long before the said time when, &c. within this kingdom of *England* absolutely put the said negro slave out of his service; and also afterwards, and before the said time when, &c. the said negro slave served other subjects of this kingdom of *England*, and at the within-written time when, &c. within this kingdom of *England*, was retained in the actual service of the said *Robert Harvey*, to take of the said *Robert Harvey* according to the rate of six pounds by the year for his wages in that behalf: but whether upon the whole matter aforesaid, by the jury aforesaid in form aforesaid found, the said *Robert Harvey* be guilty of the trespass within specified or not, the jurors aforesaid are wholly ignorant, and pray the advice of the Court here concerning the premises; and if upon the whole matter aforesaid, by the jury aforesaid in form aforesaid found, it shall seem to the Justices and the Court here that the said *Robert Harvey* be guilty of that trespass, then the said jurors say upon their oath, that the said *Robert Harvey* is guilty of the trespass aforesaid, as the said *Willoughby Chamberline* within complains against him; and they assess the damages of him the said *Willoughby*, by occasion of the trespass aforesaid, besides his costs and charges, to fifty pounds; and for his costs and charges three shillings and four-pence; and if upon the whole matter aforesaid, by the jury aforesaid in form aforesaid found, it shall seem to the same Justices here that the said *Robert Harvey* be not guilty of the trespass aforesaid, then they the said jurors say upon their oath, that the said *Robert Harvey* is not guilty of the trespass aforesaid, as he the said *Robert*

hath

hath within in pleading alledged: and because the Justices here are not yet advised, &c.

Chamberline against Harvey.

Case 92.

TRESPASS for taking a NEGRO SLAVE of the value of one hundred pounds: upon not guilty pleaded, the jury found a special verdict at the Guildhall in London:

That before the trespass committed, one Edward Chamberline was seised in fee of a plantation in Barbadoes, and of certain negro slaves thereunto belonging; that the negro now taken was born within the said island of negro parents, being slaves belonging to the said plantation; that an ordinance was made by the deputy governor, council, and assembly of the representatives in the said island, that the negro slaves there shall be real estates, and shall descend to the heir or widow as lands of inheritance, &c.; that Edward Chamberline died seised, &c. after whose death one third part of the plantation and negro slaves (whereof this negro was one) came to Mary his widow and relict, as her dowry, and the reversion of the said thirds, and the two other thirds descended to the plaintiff, as son and heir of Edward Chamberline; that the said Mary afterwards married Sir John Witham, who thereupon was seised, in her right for her life, of one third part of the plantation and slaves; and being so seised, he did, in the thirty-sixth year of king Charles the Second, bring this very negro into England, where he continued in the service of the said Sir John Witham several years; that he was baptized here, but without the privity or consent of the plaintiff; that after the death of the said Mary, Sir John Witham turned this negro out of his service, who afterwards served several other masters here, and at the time when the trespass was supposed to be committed, was in the service of the defendant, and had for his wages six pounds by the year. But whether, upon the whole matter, the defendant be guilty of the trespass, they refer to the Court.

Trespass will not lie for "taking" and carrying away one negro slave of the price of one hundred pounds, &c. so that the plaintiff was totally without, and lost the use and benefit of, the said negro, &c." for by the laws of England one man cannot have an absolute property in the person of another man; but, as under certain circumstances a man may have a qualified property in another, in the character of servant, &c. an action for taking him away, will, in such case, lie per quod servitium amittit.

S. C. Carth. 396.
S. C. 1. Ld. Ray. 146.

S. C. 3. Ld. Ray. 129.

1. Lev. 201.

* [187]

1. Lev. 336,

337.

3. Keb. 785.

Ray. 16.

2. Salk. 666.

Cro. Car. 15.

391. 545.

Cro. Eliz. 126.

545.

Cro. Jac. 262.

463.

2. Ld. Ray. 1274.

Somerset.

A case like this never happened before.

* Three questions were made upon this verdict:

FIRST, Whether, upon this finding, there was any legal property vested in the plaintiff?

SECONDLY, If any such property be vested in him, then whether the bringing this NEGRO into England be not a manumission, and the property thereby divested?

THIRDLY, Whether an action of trespass will lie for taking a man of the price of one hundred pounds?

1. Bl. Com. 423. Cowp. 54. 2. Bott's P. L. 330. See Mr. Hargrave's case of

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Vide March 12.

Hob. 283.

Ray. 16.

2. Lev. 201.

3. Lev. 336.

2. Salk. 667.

See ante.

Vide 2. Salk.

417, 412.

As to THE FIRST, Though the word "*slave*" has but a very harsh sound in a free and christian country, yet perfect bondage has been allowed in such places. The power which naturally arises to the lord over such bondmen or slaves, is by reason of his supplying them with food and raiment during their lives, as a recompence for their labour; such is the usage of the island of *Barbadoes*. The jury have found a law there, which makes these slaves part of the real estate, and this negro was born of negro parents there. Now the children of such parents are slaves as well as they. So it was amongst THE ROMANS; where both parents were aliens, the children were so too. This ordinance made in *Barbadoes*, being subject to the crown of *England*, has the same force there as an act of parliament has here. Now if this had been the case of a *villein* here, the jury have found enough to make him *regardant to a manor*; in which, by the law of this land, the lord had so absolute a property, that if he were taken away, the party detaining him gained no property in him; for then the writ *de nativo habendo* must be brought against him, but it is only directed to the sheriff to take him wherever he may be found, &c. An action of *trover* will not lie, except where the plaintiff has a property in the thing demanded. Now it cannot be denied but that *trover* will lie for a *negro*; for so was the case *Butts v. Penny*. It is true, there is no judgment entered in that case; that may be the fault of the attorney in not bringing in THE POSTEA (a).

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SECONDLY, Nothing here found amounts to a manumission or enfranchisement. * Manumission is defined by *Littleton* (b) to be, when the lord makes a deed to his *villein* to enfranchise him, this is one kind of manumission; the other is, when the lord does some act which, in judgment of law, amounts to make his *villein* free, as by making a feoffment in fee to him, and delivering seisin accordingly, &c. It is true, he may have several temporary privileges whereby he may be exempted from the seisin of the lord, as entering into religion, &c. but can in no case be enfranchised but where the lord is an actor; and even in such case, if the lord himself had enfranchised him by deed, *cum totâ sequelâ suâ procreatâ et procreandâ*, this was not a sufficient manumission of such children which he had before the execution of the deed without special words, because they were *villeins* in possession at that time (c). But here is nothing of the lord's consent found in this verdict; but the contrary. Then the bringing of him into *England* by *Sir John Witham* will not make him free, because he was a trespasser in so doing; for he ought not to have removed him from the plantation to which he was *regardant*. If, therefore, taking him from the plantation was *tortious*, then the finding that he continued in his service, and that he was afterwards turned away,

(a) Trinity Term, 9. Car. 2. 2. Lev. 301. 3. Keb. 785.

(b) Lit. sect. 204.

(c) Co. Lit. 137. Year Book, 5. Hen. 7. pl. 14. a. Bro. Abs. "Villénage," pl. 26.

will not amount to a manumission. The chief question then is, Whether *baptism* without the privity of the lord will amount to a manumission? Now if a bare consent, without any other act of the lord, will not be sufficient to make his *villein* free, so as to divest himself of that property which he had in him; then *a fortiori*, what the *villein* does without the consent of the lord, cannot acquire a manumission. That a bare consent alone is not sufficient, appears by my Lord Coke's Commentary on *Littleton* (a), and the authorities there cited in the margin, that if a *neif regardant* to a manor marry a freeman without the license of the lord, who afterwards makes a feoffment of the manor, and then her husband dies, the lord shall still have the *neif*, and not the feoffee. If baptism should be accounted a manumission, it would very much endanger the trade of the plantations, which cannot be carried on without the help and labour of these slaves; for the parsons are bound to baptize them as soon as they can give a reasonable account of the christian faith; and if that would make them free, then few would be slaves.

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* IT WAS ARGUED on the other side, That it is against the law of nature for one man to be a slave to another. It is true, that a man may lose his liberty by a particular law of his country, or by being taken in war, for there he owes his life to those who preserve him; or where a man voluntarily sells himself for sustenance, or alimony; but no such thing is found in this verdict, and nothing shall be presumed but what is in favour of liberty. It is by the constitution of nations, and not by the law of nature, that the freedom of mankind has been turned into slavery: thus says BRACTON (b), *Fiunt etiam servi liberi homines captivitate de jure gentium*. But our laws are called *Libertates Anglie*, because they make men free; and therefore even in the time of *villennage* here, the lord had not such an absolute property over his slave, but that in some cases that very slave might have an action against his lord; as an appeal for the death of his father: so where the lord was indebted to the testator of his *villein*, he might bring an action against him as executor; so might the *neif* have had an appeal of rape, being ravished by her lord (c). If slavery in *Barbadoes* and *villennage* here were the same sort of servitude, the plaintiff may be seised of this negro as a *villein in gross*, or as *regardant* to the plantation; for there were but two sorts of *villeins* here, either *in gross*, or *regardant* to particular manors. Now this cannot be a *villein regardant* to the plantation, for then the plaintiff and his ancestors must be seised of this negro and his ancestors time out of the memory of man, which could not be, because *Barbadoes* was acquired to THE ENGLISH within time of memory; and he cannot be a *villein in gross*, because it is found that he was born of parents belonging to the plantation (d). But if the plaintiff have

* [189]

(a) Co. Lit. 136. b.

(b) Bract. bk. 1. cap. 6.

(c) Littleton's Tenures, &c. 189, 190.

(d) Littleton's Tenures, 181, 182.

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any property in this *negro*, he must either have an absolute or a qualified property in him at the time of the trespass supposed to be committed. He could not have an absolute or general property, because by MAGNA CHARTA, and THE LAWS OF ENGLAND, no man can have such a property over another. And if he had only a qualified property, then an action of trespass will not lie, but an action *per quod servitium amisit*.

* [190]

* But if the plaintiff had any right to the servitude of this *negro*, that right is now divested by his coming into *England*; for the ordinance made in *Barbadoes* shall not make him so *regardant* to the plantation there, as to go to the heir, because that is only *lex loci*, and adapted to that particular place (as the law of *Stannaries* in *Cornwall*), and extends only to that country, so long as he is occupied in service on that plantation; and if he be brought into another country where that law has no effect, that amounts to a manumission, so that the bringing him into *England* discharges him of all servitude or bondage, especially being turned out of the service of his master, and not allowed sustenance by him; for food and cloathing are the only recompence for servitude. But being baptized according to the rite of THE CHURCH, he is thereby made a christian, and christianity is inconsistent with slavery. And this was allowed even in the time when the popish religion was established, as appears by *Littleton* (a); for in those days, if a *villein* had entered into religion, and was professed, as they called it, the lord could not seize him; and the reason there given is, because he was dead in law, and if the lord might take him out of his cloister, then he could not live according to his religion. The like reason may now be given for baptism being incorporated into the laws of the land; if the duties which arise thereby cannot be performed in a state of servitude, the baptism must be a manumission. That such duties cannot be performed is plain, for the persons baptized are to be confirmed by the diocesan when they can give an account of their faith, and are enjoined by several acts of parliament to come to church: and it cannot be an objection of any weight to say, that though he was baptized, yet it was not by the consent of the lord, because he is enjoined by the law. But if the lord have still an absolute property over him, then he might send him far enough from the performance of those duties, *viz.* into *Turkey*, or any other country of infidels, where they neither can or will be suffered to exercise the christian religion. The law is so careful of the liberties of men under its protection, that the king himself, who has so great a right to the duty and service of his subjects, cannot send any-one out of *England* against his will to serve in any other place, even in his own dominions, for this, my LORD COKE says, would be *perdere patriam* (b): and therefore the lord could not send a *villein* * in gross out of the kingdom, because the king had a right

* [191]

(a) Sect. 202.

2. Hawk. P. C. c. 33.

(b) 2. Inst. 46. 1. Bl. Com. 137.

in him. Thus it is also in the case of *apprentices*, who, though they voluntarily submit themselves to serve their masters for a certain number of years, yet they cannot be sent out of the kingdom, though it be to their master's house, and in his service, unless it be the agreement, or the nature of the apprenticeship is such (a). Captives taken in war are under the most slavish degree of servitude, and those to whom they are subjected have thereby the highest right in them, because it is lawful not only to dispose of them at their pleasure, but even to destroy them. But it is observed amongst *the Turks*, that they do not make slaves of those of their own religion, though taken in war; and if a christian be so taken, yet if he renounce christianity, and turn *Mahometan*, he thereby obtains his freedom (b). And if this be a custom allowed amongst infidels, then baptism in a christian nation, as this is, should be an immediate enfranchisement to them, and they should thereby acquire the privileges and immunities enjoyed by those of the same religion, and be intitled to THE LAWS OF ENGLAND.

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against
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THIRDLY, This action will not lie for taking a man *pretii centum librarum*.—FIRST, Because it is not found that either the widow or the heir was in possession of this plantation and negro slaves at the time of the action brought; for if this negro be part of the real estate, then *Sir John Witham* was a disseisor by bringing him into *England*, and a disseisee cannot have an action of trespass before a re-entry, because the freehold is in the disseisor (c). SECONDLY, The vagrancy of a *villein*, or a *neise*, is the fault of the lord; and therefore, in the seventh year of *Richard the Second*, it was held, that if a stranger marry such *neise*, not knowing to what lord she belonged, he is not a trespasser (d), which is this very case in point.

Adjournatur.

Afterwards, in *Hilary Term*, judgment was given for the defendant, that the bill shall abate; for THE COURT were of opinion, that no action of trespass would lie for the taking away a man generally, but that there might be a special action of trespass for taking his servant, *per quod servitium amisit*. Carth. 396.

(a) *Coventry v. Woodall*, Hob. 134.

(c) 2. Roll. Abr. 553.

7. Brownl. pl. 67.

(d) Fitz. Abr. "Bar." pl. 240.

(b) *Molloy de Jure Maritimo*, 355.

Roberts against Withered.

Case 93.

MIDDLESEX, } FRANCIS ROBERTS, who sues as well
to wit. } for the lord the king as for himself in this
behalf, complains of *Thomas Withered*, being in the custody of the
marshal of the *Marshalsea* of the said lord the king, before the
king

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king himself, of a plea that he render to the said lord the king, and to him the said *Francis*, thirty-six barrels of olive oils, containing in the whole thirteen tuns of olive oils aforesaid, of the value of seventy pounds, and also sixty-nine pipes of wine, containing in the whole thirty-five tuns of wine aforesaid, of the value of one thousand and forty pounds, which from the said lord the king and the aforesaid *Francis* he unjustly detains; for that, to wit, that whereas after the first day of *April*, in the year of Our Lord one thousand six hundred and sixty-seven, to wit, between the nineteenth day of *September*, in the year of Our Lord one thousand six hundred and ninety-four, and the day of exhibiting this bill, to wit, on the tenth day of *April* aforesaid, goods were imported by the aforesaid *Thomas Withered*, and by him had and possessed, and to his own proper use converted, and deposited in a certain ship or vessel called *THE STELLA*, at *Genoa*, in parts beyond the seas, in this realm of *England*, to wit, at *Ratcliffe*, in the county of *Middlesex* aforesaid, within the port of *London*, the same ship or vessel called *STELLA* not being, at the time of importing the goods aforesaid, a ship or vessel truly and without fraud belonging to the people of *England*, *Ireland*, *Wales*, or the town of *Berwick upon Tweed*, or either of them, as the owner and proprietor thereof, and whereof the master and three-fourths of the mariners at least were *English*; and the aforesaid ship or vessel not being a foreign ship or vessel of the built of *Genoa*, a place of which the said goods were the growth, production, or manufacture, or of such port where the said goods could only be, or were most usually first shipped for transportation, and whereof the master and three-fourths of the mariners at least were of the same country or place; against the form of the statute in such case made and provided: by reason whereof, and also by force of the statute aforesaid, the goods aforesaid, and every parcel thereof, have become, and are forfeited; and thereupon an action hath accrued to the said lord the king, and to him the said *Francis*, who sues as well, &c. to require and have of the said *Thomas*, for the said lord the king and himself, the aforesaid goods in form aforesaid forfeited. Nevertheless, the aforesaid *Thomas*, although often requested, &c. the aforesaid goods in form aforesaid forfeited to the said lord the king and the said *Francis*, who sues as well, &c. hath not yet delivered, but the aforesaid goods to the said lord the king and the said *Francis*, who sues as well, &c. hath hitherto refused to deliver, and still refuses to deliver, and unjustly detains. By reason whereof the said *Francis*, who sues as well, &c. says, that he has received injury, and is damnified to the value of two thousand pounds; and therefore he brings suit, &c.

Roberts

* Roberts *against* Withered.

Case 94.

AN action of *detinue* was brought for goods forfeited by virtue of the statute 12. Car. 2. c. 18. intituled, "An act for encouraging and increasing of shipping and navigation," in the eighth paragraph whereof it is enacted, amongst other things, "That no *olive-oil*, or *wines*, shall, from and after the first day of April, in the year 1667, be imported into *England*, *Ireland*, *Wales*, or town of *Berwick upon Tweed*, in any ship or ships, vessel or vessels whatsoever, but in such as do truly, and without fraud, belong to the people thereof, or of some of them, as the true owners and proprietors thereof, and whereof the master and three-fourths of the mariners at least are *English*, except only such foreign ships and vessels as are of the built of that country or place of which the said goods are the growth, production, or manufacture respectively, or of such port where the said goods can only be, or most usually are, first shipped for transportation, and whereof the master and three-fourths of the mariners at least are of the said country or place, under the penalty and forfeiture of ship and goods; one moiety to his majesty, and the other moiety to him or them that shall inform, seize, or sue for the same in any court of record."

Upon *non detinet* pleaded, there was a verdict for the plaintiff.

And now it was moved in arrest of judgment, that an action of *detinue* will not lie except where the defendant comes by the goods either by *delivering* or by *finding*, and where the plaintiff has an *antecedent right*, neither of which is this case; and it is not enough to say, that the statute vests a property in him who first sues for the forfeiture, because, by the express words thereof, the right is not attached but by seizure or information. Most of the statutes which give penalties of forfeiture direct how they shall be recovered, *scilicet*, "by action of debt, bill, plaint, &c." but where a law gives a property "by information or seizure" of the goods, an action of *detinue* will not lie till that be done, because it cannot be a wrongful detainer of that to which the party had no right.

SECONDLY, If *Genoa* be the place of the growth of the goods, then the shipping them there is not an offence within the act; and they do not say, that the goods are not of the growth, production, or manufacture of *Genoa*, or that it was not the place where they were usually shipped at the time of the making of the act. The proceedings upon such popular statutes have usually been by way of information: so was the case of *Pitcher v. Jones* (a); it was an *information* for importing two bags of spices from *Holland*, being of the growth of *Asia*, *Africa*, or *America*, that not being the place where such goods were first most usually shipped for transportation, *contra formam statuti*: there was a judgment for the plaintiff; but it was arrested, because it was not

If a statute, viz. the *Navigation Act* 12. Car. 2. c. 18. ordain, that no goods shall be imported but in English-built ships, &c. "under the penalty and forfeiture of ship and goods, one moiety to the king, the other to him that shall inform, seize, or sue for the same," without saying by what mode of proceeding; an action of *detinue* will lie before seizure for a ship and goods so forfeited; for the property is *divested* out of the owner by the forfeiture, and *vested* in the person who sues, by the commencement of the action.

S.C. 1. Salk 223.
S.C. Comb. 361.
S.C. 12. Mod. 92.
11. Co. 89.
1. Rol. Rep. 118.
161.
2. Rol. Rep. 275.
296.
Hard. 353.
Noy, 12.
Cro. Jac. 39.
Cro. Eliz. 457.
2. Danv. 510.
2. Bac. Abr. 47.

* [194]

(a) Mich. Term 13. Car. 2. in the exchequer, *Hardres*, 217.

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alleged, that the goods were not of the growth of *Holland*; though the information did set forth, that they were of the growth of *Asia, &c.* Now it is not material where such goods were usually shipped, either before or since the making the act; for they ought to aver, that *Genoa* was not the usual place of shipping them at the time when the act was made; like the case where the king granted to a bishop (*a*), that the manor and lands belonging to his bishoprick should be free for ever from such a forest; the bishop could not claim any freedom for any other lands, but such which he had at the time of the making the grant.

BUT THOSE WHO ARGUED for the plaintiff, said, that nothing remained to be answered, upon reading the act and the declaration, but THE FIRST QUESTION, which was, Whether an action of *detinue* would lie or not in this case? And it was insisted, that it would; for as the act had given only the penalty of one hundred pounds, one moiety to the king, the other to him who shall sue for the same, and had not said in what action, it will not be denied but that *debt* would have been the proper action in such case for the informer to recover his moiety. There was no difference between *debt* and *detinue* for such a forfeiture; for the informer had an antecedent property in neither. But in this case there is a forfeiture immediately vested in the king and party, and if one may have an action, the other may also sue for his moiety. Now it is no argument to say, because some persons have chose to proceed by way of *information* upon forfeitures on penal statutes, therefore an action of *detinue* will not lie for such a forfeiture.

* To prove that a forfeiture was *vested*, this case was compared by THE COURT to a *replevin*, which supposes an antecedent property, as much as an action of *detinue*; for it is a rule, that the plaintiff must have the property of the goods in him at the time when they were taken; but yet the lord shall have a *replevin* of the cattle of his *villein* being distrained, though he had no property in them at the time of the distress made: for my LORD COKE (*b*) was of opinion, that the bringing a *replevin* is a claim in law, and that the property is vested thereby in the plaintiff. So by navigating contrary to the act, the property is divested out of the former owners; and by this action now brought, it is vested in the plaintiff, and therefore he may bring *detinue* for it.

So judgment was given for the plaintiff by THE WHOLE COURT without any farther argument (*c*).

(a) The case of the Bishop of Coventry, 2. Roll. Abr. 202.

(b) Co. Lit. 145. b. Fitz. N. B. 69. b.

(c) See the case of Wilkins and others v. Despard, Hilary 33. Geo. 3. in which it is determined on the authority of the above case, that if a ship be *seized* or forfeited under the Navigation Act 12. Car.

2. c. 18. by a governor of a foreign country belonging to Great Britain, the owner cannot maintain *trespass* against the party seizing, although the latter do not proceed to condemnation; for by the forfeiture the property is divested out of the owner. 5. Term Rep. 112.

THE TOWN OF NEWCASTLE UPON TYNE, } BE it remem-
to wit.

bered, that heretofore, to wit, in *Easter Term* last past, before the lord the king at *Westminster*, came *Henry Wolfe*, by *Thomas Mathews* his attorney, and brought into the court of the said lord the king then there, his certain bill against *Benjamin Davison* merchant, late sheriff of the town aforesaid, in the custody of the marshal, &c. of a plea of debt; and there are pledges of prosecuting, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit: TOWN OF NEWCASTLE UPON TYNE. *Henry Wolfe* complains of *Benjamin Davison* merchant, late sheriff of the town aforesaid, in the custody of the marshal of the *Marshalsea* of the said lord the king, before the king himself, of a plea that he render to him one hundred and eight pounds of lawful monies of *England*, which he owes to and unjustly detains from him; for that whereas the said *Henry* heretofore, to wit, in the Term of *Saint Michael*, in the second year of the reign of the lord *William* now king, and the lady *Mary* late queen of *England*, in the court of the said lord the king and lady the late queen, before *HENRY POLLEXFEN, Knight*, and his companions, then justices of the lord the king and lady the late queen, of the bench at *Westminster*, in the county of *Middlesex*, by the consideration of the same Court, recovered against one *George Dale*, gentleman, by the name of *George Dale*, late of *Gateshead* in the county of *Durham*, gentleman, as well a certain debt of one hundred and six pounds, as forty shillings, which to the same *Henry Wolfe*, in the same court, were adjudged for the damages which he had sustained by occasion of the detaining of that debt whereof the said *George* was convicted, as by the record and proceedings thereof in the said court of the lord the king of the bench aforesaid here, to wit, at *Westminster* aforesaid, remaining, manifestly appears: Therefore * the aforesaid *George*, for that he came not before the said justices of the lord the now king and lady the late queen of the bench, at *Westminster* aforesaid, to satisfy the said *Henry* of the debt and damages in form aforesaid recovered, whereupon he was as aforesaid convicted, was put in the *exigent*, and was outlawed in *London* by occasion thereof afterwards, to wit, on *Monday* next after the feast of *St. Agatha*, virgin, in the second year aforesaid, at THE HUSTINGS of the Common Pleas, then held in THE GUILD-HALL of the city of *London*, at the suit of the same *Henry*, was outlawed, as by the record and proceedings of the same outlawry, in the aforesaid court of the said lord the now king of the bench remaining more fully and manifestly appears: upon which certain OUTLAWRY against the aforesaid *George*, in form aforesaid promulgated, the same *Henry Wolfe* afterwards, to wit, on the thirteenth day of *April*, in the fourth year of the said lord the king and lady the late queen, for the better obtaining of the debt and damages aforesaid, sued out of the aforesaid court of the said lord the king and lady the late

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late queen of the bench, a certain writ of the said lord the king and lady the late queen, of *capias utlagatum* against the aforesaid *George* to the then sheriff of the aforesaid town of *Newcastle upon Tyne* directed, by which writ the said lord the king and lady the late queen commanded the same sheriff of the town of *Newcastle* aforesaid, upon *Tyne* aforesaid, that he should take the aforesaid *George*, at the suit of the same *Henry*, as before-mentioned; outlawed, wheresoever, in the bailiwick of the same sheriff, as well within liberties as without, he might be found, and him safely keep, so that he might have his body before the justices of the said lord the king and lady the late queen, at *Westminster*, on the morrow of the Ascension of Our Lord then next following; to do and receive what the same Court of the said lord the king and lady the late queen shall consider in that behalf, and that he have there that writ; which writ the same *Henry Wolfe* afterwards, and before the return of the same writ, to wit, on the fourth day of *May*, in the above-mentioned fourth year of the said lord the king and lady the late queen, at the town of *Newcastle upon Tyne* aforesaid, in the county of the same town, delivered to one *Joseph Atkinson*, then being sheriff of the town aforesaid, to execute in due form of law: by virtue of which certain writ, the aforesaid *Joseph Atkinson* afterwards, and before the return of the same writ, to wit, on the seventh day of *May*, in the fourth year above-mentioned, then being sheriff of the town aforesaid, at the same time, in the same county town, took and arrested the said *George*, and him in his custody, for the debt and damages aforesaid, then and there had, and him, in the prison of the said lord the king and lady the late queen, then detained and kept in custody until the going out of him the said *Joseph* from his office of sheriff of the town aforesaid. And the aforesaid *George* so in the custody of the aforesaid *Joseph Atkinson*, in execution for the debt and damages aforesaid, in form aforesaid being, the same *Joseph Atkinson* afterwards, to wit, on the thirteenth day of *October*, in the fourth year above-mentioned, from his office of sheriff of the town aforesaid, at the said town of *Newcastle upon Tyne*, was in due manner removed; and afterwards, to wit, on the same thirteenth day of *October*, in the fourth year above-mentioned, the aforesaid *Benjamin*, into the office of sheriff of the same town, at the town of *Newcastle upon Tyne* aforesaid, was duly elected and appointed. And the aforesaid *Joseph Atkinson*, in his said exit from his office of sheriff of the town aforesaid, in due manner delivered to the said *Benjamin Davidson*, and into his custody, the aforesaid *George* in prison aforesaid, so as before-mentioned detained in execution for the debt and damages aforesaid, in form aforesaid, that is to say, at the town of *Newcastle upon Tyne* aforesaid; and the same *Benjamin*, as sheriff of the town aforesaid, the aforesaid *George*, in prison aforesaid, under his custody, then and there in execution for the debt and damages aforesaid, received, had, and detained. And the said *George*, so in custody of him the said *Benjamin*, sheriff of the town aforesaid, as before-mentioned, being in execution for
the

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the debt and damages aforesaid, in form aforesaid being detained; the same *Benjamin*, afterwards, to wit, on the twentieth day of *August*, in the fifth year of the reign of the said lord the king and lady the late queen, at the town of *Newcastle upon Tyne* aforesaid (the same *Benjamin* then being sheriff of the town aforesaid), the aforesaid *George*, from the prison aforesaid, out of the custody of him the said *Benjamin*, permitted to go at large and escape where he would, without the consent and against the will of the same *Henry*, and the same *Henry Wolfe* of the debt and damages aforesaid, or any part thereof being unsatisfied, whereby an action hath accrued to the same *Henry Wolfe*, to have of the aforesaid *Benjamin* the aforesaid one hundred and eight pounds; yet the said *Benjamin*, though often required, &c. the aforesaid one hundred and eight pounds to the same *Henry Wolfe* has not paid, but to pay the same to him hath hitherto wholly refused, and doth still refuse, to the damage of the said *Henry Wolfe* of thirty pounds; and thereupon he brings suit, &c.

And now at this day, to wit, on *Friday* next after the morrow of the *Holy Trinity*, in this same Term, until which day the said *Benjamin* had leave to imparl to the bill aforesaid, and then to answer, &c. before the lord the king at *Westminster* cometh as well the said *Henry*, by his attorney aforesaid, as the said *Benjamin*, by *Nicholas Hardinge* his attorney. And the said *Benjamin* defends the force and injury when, &c. and saith, that he doth not owe the said *Henry* the said one hundred and eight pounds, nor any part thereof, in manner and form as the said *Henry* above thereof against him has declared: and of this he puts himself upon the country: and the said *Henry* thereupon likewise, &c. THEREFORE let a jury thereof come before the lord the king at *Westminster* on *Wednesday* next after three weeks of the *Holy Trinity*, and who neither, &c. to take cognizance, &c. because as well, &c. The same day is given to the parties aforesaid there, &c. AFTERWARDS, the process between the parties aforesaid is thereupon of the * plea aforesaid continued, by respiting the jury thereof between them, before the lord the king at *Westminster*, until *Wednesday* next after three weeks of *St. Michael* thence next following, unless the justices of the lord the king assigned to take the assizes in the county of the city of *Newcastle upon Tyne* shall before come on *Monday* the twenty-second day of *July*, at the *Guildhall* of the city of *Newcastle upon Tyne*, in the county of the said city, by form of the statute, &c. for want of jurors, &c. At which day, before the lord the king at *Westminster*, came the parties aforesaid by their said attornies, and the said justices of the said lord the king, before whom, &c. sent here their record before them had

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in

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Quere.

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in aid for the county of the city of *Newcastle upon Tyne*, by form of the statute, &c. comes as well the within-named *Henry Wolfe* as the within-written *Benjamin Davidson*, by their attornies within contained. And the jurors of the jury, whereof mention is within made, being likewise called, come, who say upon their oath, that the aforesaid *Henry* recovered against the within-named *George Dale*, the debt and damages in the declaration of him the said *Henry*, as within written mentioned, in manner and form as by the said declaration is supposed. And that the said *George* thereupon, at the suit and prosecution of the said *Henry*, was OUTLAWED in manner and form as in his declaration is specified; and that the said *Henry* thereupon was prosecuted by the writ of *capias utlagatum*, in the said declaration mentioned; and the same to the within-named *Joseph Atkinson*, sheriff of the city of *Newcastle upon Tyne* within-written delivered, who took and arrested the said *George*, by virtue of the said writ, in manner and form as in the said declaration is contained. And that the said sheriff of the aforesaid city, the said *George* in his custody for and upon that writ had, and him in the gaol of the lord the king and late lady the queen there detained and kept in custody, as by law required; and on his quitting his office of sheriff of that town, in due manner delivered him to the aforesaid *Benjamin* (he being sheriff of the said town, as in the said declaration is contained), and in his custody the aforesaid *George*, in prison aforesaid, so as aforesaid detained, by the cause aforesaid; and also the said *Benjamin*, as sheriff of the town aforesaid, the aforesaid *George*, in the prison aforesaid, under his custody, then and there received, had, and detained, as by law required. And the said *George*, being so in prison, under the custody of the said *Benjamin*, in form aforesaid detained, the said *Benjamin*, being sheriff of the town as aforesaid, the said *George*, from the prison aforesaid, out of the custody of the said *Benjamin*, permitted to go at large where he would, and voluntarily permitted to escape, without the command of the said *Henry*, he the said *Henry* not being satisfied of the debt and damages, or any part thereof, as the said *Henry*, in his declaration * aforesaid, has set forth. But the jurors aforesaid, upon their oath aforesaid, further say, that the aforesaid *Henry* made no petition other than in the said declaration of him the said *Henry*, to charge the aforesaid *George* in execution for the debt and damages aforesaid, by the said *Henry* against the aforesaid *George* in form aforesaid recovered. And whether the aforesaid *George*, so as aforesaid to the prosecution of the said *Henry*, by virtue of the writ of *capias utlagatum* aforesaid, of and upon the judgment aforesaid, so as aforesaid taken and arrested, beyond the year and a day after that judgment given, was or might be lawfully in execution at the suit of *Henry* for the damages aforesaid, without any express petition by him the said *Henry*, to charge the said *George* in execution in such behalf, or not, the said jurors are wholly ignorant, and therefore pray the advice of the Court here, &c. And if it shall seem to the Court here, that the aforesaid *George*, so from prosecuting the aforesaid

Henry,

Henry, by virtue of the writ of *capias utlagatum* as aforesaid, was legally taken and arrested after the year and a day after judgment aforesaid, was lawfully rendered, or might be in execution at the suit of him the said Henry, for his debt and damages aforesaid, without any express petition by him the said Henry, to charge the said George in execution in that behalf made; then the jurors aforesaid say, upon their oath aforesaid, that the aforesaid Benjamin owes the aforesaid Henry the within-written one hundred and eight pounds, in form as the said Henry within thereof hath declared: and then they assess the damages of him the said Henry by occasion of the detention of his debt, besides his costs and charges by him laid out about his suit in this behalf, to six pence, and for those costs and charges to forty shillings. But if it shall seem to the Court here, that the aforesaid George, so by prosecuting the aforesaid Henry, by virtue of the writ of *capias utlagatum* aforesaid, so as aforesaid taken and arrested beyond the year and a day after judgment aforesaid given, was not lawfully nor might be in execution at the suit of him the said Henry, for his debt and damages aforesaid, without express petition by him the said Henry to charge the said George in execution in that behalf made; then the jurors aforesaid, upon their oath aforesaid, say, that the aforesaid Benjamin does not owe the aforesaid Henry the said one hundred and eight pounds, nor any part thereof, as he the said Benjamin within, in pleading thereupon, hath alledged. And because the Court of the said lord the king here is not yet advised what judgment to give of and upon the premises, a day is thereof given to the parties aforesaid until — day next after —, to hear their judgment of and upon the premises, for that the Court of the lord the king here is not yet advised thereof, &c.

• Wolfe against Davison.

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Case 96.

DEBT against the sheriff for an escape, wherein the plaintiff sets forth, that he had obtained a judgment in the court of common pleas against one Dale for one hundred and sixty pounds and costs, and the said Dale not appearing to satisfy the said judgment, was outlawed at the suit of the plaintiff, who thereupon sued forth a *capias utlagatum* against him, directed to the then SHERIFF OF NEWCASTLE; and that the plaintiff, before the return of the said writ, delivered it to one Joseph Atkinson, then sheriff of the said vill, who by virtue thereof arrested the said Dale, and detained him in prison for the said debt and damages till the said Atkinson was discharged from his office of sheriff; that the defendant was afterwards under-sheriff, and the said Dale was delivered to him in custody and in execution for the said debt and damages; and that afterwards he suffered him to escape, the said debt not being paid.

An action of debt lies against a sheriff for suffering the voluntary escape of a prisoner in his custody on a *capias utlagatum*, although he was not taken thereon until a year and a day after the judgment recovered, and there was no express prayer to the Court to charge him in custody.

S. C. Comb. 373. S. C. 1. Salk. 319. 5. Co. 88, 89. Cro. Eliz. 706, 707. Cro. Jac. 361. 1. Rol. 810. 895. 1. Leon. 263. 1. Sid. 380. Post. 413. 416. Moor, 641. Fitzg. 265. 2. Stra. 901. 3. Com. Dig. "Escape," (B. 1.) (c.) 2. Bac. Abr. 235. 3. Bac. Abr. 761.

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THE JURY, upon *nil debet* pleaded, find a special verdict, that the plaintiff had obtained a judgment against the said *Dale* for the said debt and damages: they find the *outlawry* and the *capias utlagatum*, and the arrest upon it; and that the said *Dale* was in the custody of the defendant, then SHERIFF OF NEWCASTLE; and that he voluntarily suffered him to escape, the said debt not being paid: Then they make a special conclusion, that if *Dale*, so taken a year and a day after the said judgment recovered against him, could be in execution for the said debt and damages, without any express prayer to charge him in custody, then they find for the plaintiff, &c.

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IT WAS ARGUED for the plaintiff, that when a man is outlawed after judgment, the *capias utlagatum* is the proper process, and then the plaintiff is at the end of his suit (a); and therefore there can be no default in him for not continuing his process so as to have the prisoner brought into court, and then upon prayer of the defendant to be committed in execution at his suit. But admitting there were any laches in the plaintiff, or discontinuing the process, yet if the party be in execution upon a *capias utlagatum* after judgment, he is in execution at the suit of the plaintiff, if he please (b); for though the outlawry be in the king's name, yet it is at the suit of the party and for his benefit: and the sheriff must take notice of the * law, that he has him in custody for that purpose "*unde convictus est*", for these are the words in the writ. If the defendant promise to pay a debt in consideration of forbearance to prosecute a *capias utlagatum*, this is good in law (c), which proves that an outlawry is at the suit of the party; for such a promise would be void to stay any process at the suit of the king. In the *Fifth Report* (d) there is a case in point: *Layton* brought an action of debt against *Walwyn* and had judgment, and then he was outlawed, and taken upon the *capias utlagatum*, and escaped; whereupon the action was brought against *Garnon* the sheriff; and it was resolved (e), that at common law, if there be an outlawry after judgment in debt, and the party is taken upon the *capias*, there is an end of the plaintiff's suit, and if no laches be in him in continuing his process, he shall be in execution at his suit if he will; for it is but reasonable, that if the king shall have a benefit at the suit of the party, that the party shall have a benefit at a suit of the king. This case was adjudged in *Michaelmas Term*, in the fortieth year of the queen: and three years afterwards, in the same Term, *POPHAM* and *FENNER*, *Justices*, seemed to be of another opinion in an action of debt brought against an administrator upon a judgment had against the intestate (f), where the defendant pleaded, that the intestate was outlawed after the judg-

(a) Post. 202.

(b) 1. Sid. 380. Yelv. 19. Cro. Eliz. 632. 706. 850. Bridg. 7. Moor, 567. Hob. 57. 115.

(c) *Jennings v. Harley*, Cro. El. 2. 909. Yelv. 19.

(d) 5. Co.

(e) *Garnon's Case*, 6. Co. 88. Cro. Eliz. 707. 1. Roll. Abr. 810. 895. Moor, 556.

(f) *Shaw v. Cuttler*, Cro. Eliz. 850. Moor, pl. 817.

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ment, and taken upon the *capias*, and died in prison; and upon demurrer to the plea those TWO JUDGES held, that he was not in execution at the suit of the plaintiff without his exprefs prayer, and the Court award it; but GAWDY, *Justice*, was of a contrary opinion in that case. And according to his opinion and the resolution in *Garnon's Case* there have been subsequent judgments in this very point, that when the party is taken upon the *capias utlagatum* he shall be in execution for the plaintiff if he will, although his body was never brought into court (a). This case came in question again in this court in *Michaelmas Term*, in the twentieth year of *King Charles the Second*. It was debt upon an escape (b), wherein the plaintiff declared, that he recovered a judgment in the thirteenth year of that king, that the party was outlawed the fifteenth, and taken upon the *capias* the eighteenth year of the same king, and escaped; but he had not declared that he was in custody, and prayed to be so at his suit, without which his imprisonment upon the *capias* did not make him in execution at his suit; for it may be he was not * contented with that, but intended to have another execution than his body. But the judgment in this case is not reported; only the opinion of POPHAM and FENNER, *Justices*, is there cited, that he shall be in execution at the suit of the party until he disclaim it. If the party be taken upon a *capias pro fine*, he shall not be in execution after a year and a day at the suit of the party without prayer (c). But there is a difference between that and this case (d); for here it appears by verdict that the plaintiff sued out the *capias* for the recovery of his debt, and it appears plainly that he intended to have the body of the party in custody.

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THOSE WHO ARGUED on the other side, admitted, that if the escape had been within the year after he was taken by the *capias*, the plaintiff should have an action of debt against the sheriff for an escape; and the reason is, because within the year the plaintiff might have brought a *capias ad satisfaciendum* against him, and charged him in custody, but after the year he hath lapsed his time, and is driven to a *scire facias*, and therefore he shall not be then in execution at his suit without continuing the process; he is in at the suit of the king to answer the contempt of his laws (e), and so it would have appeared if the sheriff had returned a *cepi corpus* upon the *capias utlagatum*; therefore something must appear upon record, to make him in execution at the suit of the party. When the defendant is taken upon the *capias utlagatum*, there is an end of the party's suit as to any other process to be sued by him (f), for he cannot have a *scire facias* or any other process upon that judgment: and so it was at common law, if there had been any stay of process after the year and day; therefore it ought to be

(a) Moor v. Reynell, Bridg. 6. Cro.

Jac. 619. Latch. 200.

(b) Buckland v. Kelland, 7. Sid. 380.

(c) Bridgman, 7.

(d) Cro. Jac. 543. 620. 657.

(e) Dalton, 214.

(f) Ante, 201.

continued,

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Fitz. 265.

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continued. It is affirmed, that he is in execution of the party *volens volens*. It is true the sheriff is bound to keep his prisoners in custody, but not under equal penalties; for in some cases an action on the case only will lie against him for an escape, and sometimes an action of debt, where the plaintiff will recover both his debt and damages: but here an action on the case only will lie against the sheriff. The resolution in *Garnon's Case* will not come up to this; for the words are, If the defendant be taken upon the *capias utlagatum* at the king's suit, no laches being in the plaintiff in continuing his process, he should be in execution for the * plaintiff if he would; it is not said with prayer or without prayer, neither is the year and day mentioned there. Neither is the case in *Bridgman* (a) an authority for the plaintiff; for that was an action of the case brought against the sheriff for an escape of the party taken upon a *capias utlagatum*, which is an argument that they took the law to be otherwise at that time; for if the prisoner had been in execution at the suit of the party and escaped, they would have brought an action of debt, and not an action on the case. The like action on the case was brought against the sheriff of London for an escape by *Frost* (b), where the defendant was in custody upon a *capias utlagatum* sued after a year; and there it was agreed, that he could not be in execution at the suit of the party without prayer: but because he was discharged from his imprisonment, without finding sureties to satisfy the plaintiff according to the statute (c), the plaintiff was prejudiced thereby, and therefore an action on the case would lie against the sheriff.

But THE COURT were of opinion, that it was in vain for the plaintiff to sue out an outlawry if he had no benefit thereby when the party was taken upon the *capias* without continuing the process (d); for to what purpose should he take out a *seire facias* after judgment, when the party cannot be found and nothing can be done upon it?

Therefore JUDGMENT was given for the plaintiff.

(a) Bridg. 6. 7.

(c) 5. Edw. 3. c. 12.

(b) Frost's Case, 5. Co. 89. 1. Leon.
263.

(d) Cro. Eliz. 706. Gilb. C. P. 17.

Case 97.

The King against Cranfeild.

Q^a. If an indictment at a borough sessions need state the authority by which the sessions are held.

THE defendant was indicted at the sessions held for the borough of *Hatfield* for speaking these words, "The mayor and aldermen of *Hatfield* are a pack of as great villains as any who rob upon the highway, and we will take away their charter." He was found guilty of speaking the words.

Comb. 13. 46.
65. 414.
Cart. 14.

It was moved in arrest of judgment, and several exceptions taken:

FIRST, This being tried at a sessions of a particular borough, they should have shewed what authority they had to hold the sessions,

sions, being in a private place, either by prescription or charter, which was omitted.

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SECONDLY, The words are not indictable, for they are of heat and passion, for which the defendant ought to be bound to his good behaviour, but not indicted. * In *Easter Term*, in the twenty-first year of *King Charles the Second* (a), one *Burford* was indicted in this court for these words spoken by him of the justices of the peace: "None of the justices of the peace understand the statutes of excise, except such a one" [naming him], "and truly he does neither well understand them, nor most of the parliament-men who made them:" and this indictment was quashed.

To say of a corporation that "the mayor and aldermen are villains," is not indictable, unless applied to them in the execution of their offices.

S. C. 12. Mod. 98.

Hob. 202. Moor, 819. 2. Keb. 494. 594. 1. Mod. 35. 2. Vent. 16. 3. Salk. 698. 6. Mod. 124. 1. Hawk. P. C. c. 21. f. 13. 2. Term Rep. 199.

THIRDLY, It is said, *juratores pro domino rege presentant*, it should have been *pro domino rege et burgo prædict. presentant* (b).

Indictment.

(a) Vent. 16. 2. Keb. 494.
(b) It is said, S. C. 12. Mod. 98. that the defendant having slipped the time of moving in arrest of judgment, prayed that he might submit to a small fine; and that the Court, not being satisfied that the words were indictable, because no contempt of Government, they fined the defendant sixpence. See also *Rex v. Bur-*

ford, 1. Vent. 16. Anonymus, 1. Vent. 10. *Wrightson's Case*, 1. Salk. 698. *Reg. v. Soley*, 1. Salk. 698. *Reg. v. Langley*, 6. Mod. 124. *Rex v. Legarley*, 1. Hawk. P. C. ch. 21. f. 13.; but *Rex v. Baker*, 1. Mod. 35. seems *contra*. And NOTE, that now a motion may be made in arrest of judgment on an indictment at any time before judgment pronounced.

The King against The Inhabitants of Lisley.

Case 98.

AN ORDER of settlement was made by two justices of peace to remove one *Elizabeth Sinkwell*, late of *Lisley*, single-woman, and *William* her son, to the parish of *Morton-Hampstead*; in which order the cause assigned was, because that, by fraud and collusion of the parish of *Lisley*, she was delivered of the said bastard child in the parish of *Morton*.

FIRST, It was objected against this order to quash it, because it did not appear that the mother was last legally settled in the parish of *Lisley*, or that she was a parishioner there at the time she was delivered at *Morton*: they only said, "*Elizabeth Sinkwell*, late of *Lisley*, single-woman;" which is but a description of the person and an addition of the place, and not a sufficient allegation that she was an inhabitant there, or that the child was settled there. Now it appears by the order, that the child was born at *Morton*, and the birth *primâ facie* makes a settlement in that place, nothing appearing in the order to make him an inhabitant elsewhere; and they cannot send him back to a place where he never was.

As to THIS OBJECTION, it was answered, that the order recites her to be "late of the parish of *Lisley*, single-woman;" which is a sufficient taking notice that she was an inhabitant of that parish.

If the parish of A. procure a female parishioner to be delivered of a bastard child in the parish of B. an order of removal must state that she was a parishioner of the parish of A. at the time she was delivered; but the Court will not quash an order for this defect nine years after it was made.

Ante, 150.

2. Bulst. 349.

578.

Blackerby's Cases, p. 32.

Carth. 397.

1. Bac. Abr. 319.

Salk. 121.

Comb. 285.

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SECONDLY, The reason of the removal is too general, viz. that she was delivered at *Morton* by fraud and collusion of the parish of *Lisley*.

As to THIS OBJECTION, it was said, that the justices are not bound to shew a reason why they make such an order to * remove her; and therefore if they assign a cause uncertainly, that shall not quash an order.

THE COURT inclined, that she ought to be alledged to be a "legal inhabitant in the parish of *Lisley*;" but would not quash the order, because it was nine years since it was made, viz. ever since *October 1691*.

Case 99.

Stanford against Chamberlaine.

Judgment in the court of king's bench cannot be signed until *four days* after the return of THE POSTEA.

S.C. 3. Salk. 25.
Stiles, 442.
1. Sid. 36.
1. Lut. 11.
1. Salk. 77.
5. Com. Dig.
"Pleader,"
(S. 47.)
4. Burr. 2130.

EJECTMENT tried at the assizes, and a verdict for the plaintiff; the judgment ought not to be signed till the rules are out, which will be in *four days* after THE POSTEA returned, which happened, in this case, to be the sixth of *May*.

The plaintiff got his judgment signed on the very day, but it was not executed till after the sixth day; so that the defendant had time enough to bring a writ of error, or move any thing in arrest of judgment.

Yet THE COURT held, that the signing the judgment was irregular, it being before the day allowed by the rules of the court; and though it was taken out afterwards, that was not material.

Therefore the judgment was set aside, and the party had restitution (a).

(a) See 2. Lilly P. R. 413. Turner v. Barnesby, 1. Salk. 259. Doe v. Copeland, 2. Term Rep. 750.

Case 100.

Stephens against Squire.

If a person promise to pay a sum of money on a matter in which he and another are interested, the promise is good, although it be not reduced into writing.

S.C. Comb. 362.
Comb. 2.
1. Salk. 28.
Fitzg. 202.
2. Will. 94.

AN ACTION was brought against *Squire*, an attorney, and *two others*, for appearing for the plaintiff without a warrant. The cause was carried down to be tried at the assizes; and the defendant promised, that in consideration the plaintiff would not prosecute the action, that he would pay ten pounds and costs of suit.

And now an action was brought against the defendant upon this promise.

The question was, Whether this was a void promise by the statute 29. Car. 2. c. 3. of Frauds, being made in behalf of another, and not in writing? which statute enacts, "that no action shall be brought to charge the defendant upon any special pro-

Bull. N. P. 281. 3. Burr. 1383. Esplanasse, 100. 2. Term Rep. 80.

"mise

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"mise to answer for the debt, default, or miscarriage of another person, unless it be in writing."

STEPHENS
against
SQUIRE.

But THE COURT were of opinion, that this cannot be said to be a promise for another person, but for his own debt, and therefore not within this statute (a).

(a) See Read v. Nash, 1. Will. 305. Fish v. Hutchinson, 2. Will. 94. Williams v. Leaper, 3 Burr. 1886.

* Richards against Hill.

* [206]
Case 101. 1

AN ACTION ON THE CASE for diverting a water-course, in which the plaintiff declared, that he was *seised* of A WATER-MILL to him and his heirs, *secundum consuetudinem decanatus de Wolverhampton*, and so prescribed for a water-course, &c. and that the defendant, intending to deprive him of the profit of the said mill, did divert the water *ab antiquo cursu suo, per quod* he could not *molare* so fast. There was a verdict for the plaintiff.

A prescription for a water-course running to a mill of which the plaintiff was seised "according to the custom of the deanery of such a place," is good.

It was moved in arrest of judgment, for that a copyholder cannot prescribe in *a que estate*, and the Court could not take notice of any other estate the plaintiff had by this declaration: he should have left out *secundum consuetudinem decanatus*; for, How can he be so seised without shewing what that custom was?

1. Sid. 298.
1. Lev. 190.
3. Lev. 133.
- Carth. 84. 116.
- N. Lutw. 29.
2. Sal. 562.
3. Mod. 48.
1. Show. 64.

This objection was over-ruled by THE COURT; for if the plaintiff was seised of an estate in *Borough English*, that had been a customary estate, because he has it by the custom of the manor, and in such he may prescribe.

SECONDLY, He does not say, that he diverted the water from the mill, but "from its ancient course, *per quod, &c.*"

from a mill, an insensible *per quod* may be rejected; for as the action implies *a tort*, S. C. 1. Ld. Ray. 102. Lord Ray. 274. 293. 2. Will. 313.

On a declaration for diverting a water-course it is surplusage.

THIRDLY, The matter of his damages is laid insensibly; for the *gist* of the action is, that he had a mill, out of which he had profit by grinding: now the word *molare* is insensible, and there is a proper word for grinding.

IT WAS HELD, as to the Third Objection, that the word "*molare*" being insensible, no damages could be given for it; and that the declaration had been good, if that part of it had been left out.

So the plaintiff had his judgment.

The King against Cowper.

Case 102.

INDICTMENT against the defendant, setting forth, that there was a war with LEWIS the *French King*: that during the continuance of that war the defendant hired a boat for twenty guineas,

To hire a boat for the purpose and intention of assisting the

king's enemies, is indictable at common law, as *mispriison of treason*.

THE KING
against
COWPER.

falso, malitiosè, et proditoriè to assist the king's * enemies; that the boat so hired was brought to the shore in order to embark him and others, where he was taken. This matter was all found by verdict.

IT WAS MOVED *in arrest of judgment*, that this was not an offence at common law; for then any act which shews an *intention* to do an unlawful thing will be a fault, as if a man hire a house with an intention to set up an unlawful trade (a). If the fact itself do not import any malicious design, then the finding of the jury will not alter the nature of it (b). If then there is nothing in this indictment which favours of an offence at common law, there is nothing prohibited by any statute; for an intention to do an unlawful act is no crime by either law. In this case it is not so much as said that the defendant endeavoured to go beyond sea without the king's licence.

TO WHICH it was answered, that it is a crime to hire a boat to assist the king's enemies with an open and manifest attempt, by visible acts, so to do (c). As if a man prepare a plate of the breadth of the broad seal, and by some plain act it should appear that he designed to have counterfeited it, and is taken before his design was brought to perfection, although this do not amount to *high treason*. yet it is a *misdemeanor*. It is an innocent act to lie in a hedge; but if it be with an intention to attempt the *queen consort*, and that appear, it is a high crime. An intention to fight a *duel* is a *misdemeanor*, and punishable by fine and imprisonment; and therefore if a challenge be sent to another, though the parties never fight, yet both he who sent and he who carried the challenge are punishable (d); according to the rule which is mentioned by my LORD COKE (e), "*Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*" The knowledge and concealment of treason is *misprision* thereof, which is punished by imprisonment during life, and forfeiting of the goods and profits of lands during life (f); now since the law inflicts so high a punishment upon the concealing a treason, it cannot be a question but the bare intention to commit so high a crime is punishable likewise at common law. * It is no argument to say, that because the defendant is not guilty of the highest offence, therefore he is guilty of none, for there are gradations in law which vary the offences of men, and proportion their punishments to their crimes.

CURIA. The very intention to commit treason is regarded in law; and any preparation to assist the king's enemies is a prejudice to the public, and therefore an offence at common law. Our actions

1. Hale P. C.

371.

1. Hawk. P. C.

c. 20. f. 59.

2. Hawk. P. C.

c. 25. f. 145.

* [208]

(a)

(b) 2. Show. 2.

(c) See Lord Preston's Case, 4. State Trials, 406. Foster's Crown Law, 196.

(d) See the Case of Darcy v. Robinson,

1. Keble, 694. and Darcy v. Collins, 1. Sid. 186.

(e) 3. Inst. 158.

(f) 1. Hale P. C. 374. 652. 708.

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are governed by intentions, as qualified by them; so that in divers cases the *intention* makes the act more or less criminal.

THE KING
against
COUNTER.

Whereupon the judgment was affirmed, and the defendant fined one hundred marks, and committed till paid.

1. Lev. 146.
1. Sid. 230.
8. Mod. 92.

1. Hawk. P. C. ch. 25. f. 18. c. 65. f. 1. 1. Hale, 229. 429. 508. 532. 561.

Keat against Barker.

Cafe 103.

AN ACTION was brought against the defendant for six years wages due to the plaintiff for his salary, being a steward. There was a verdict for the plaintiff at the assizes in *Berkshire*, and only seven pounds damages given.

A plaintiff, since
2. Hec. 7. c. 4.
cannot *discontinue*
or be *non-suited*
after verdict, as
he might at
common law.

It was moved to *discontinue* the action, and that *the postea* might not be brought in.

Sed non allocatur; for after a *general verdict* the Court will not suffer the plaintiff to *discontinue* his action: it has been allowed after a *special verdict*, and an argument at bar (a); so likewise after a joining in demurrer, but not after arguing such demurrer (b). But the statute 2. Hen. 4. c. 7. ordains, "that after verdict a plaintiff shall not be nonsuit;" which was otherwise at common law, for if he did not like his damages he might be nonsuit.

Cro. Jac. 35.
2. Roll. 173.
Hott. 36.
Hard. 152.
Carth. 87.
Comb. 170.
1. Bac. Abr. 525.
3. Bac. Abr. 682.

(a) Earl of Oxford v. Waterham, Cro. Car. 575.

(b) Lord Howard's Case, 1. Sid. 84. Robinson v. Banbrough, 2. Sid. 113. But

on special circumstance and payment of costs the Court will permit a discontinuance after demurrer argued, Jones v. Pope, 1. Sid. 305. S. C. 1. Saund. 37.

The King against The Inhabitants of Haswell.

Cafe 104.

THE STATUTE 14. Car. 2. c. 12. enacts, "That upon the complaint of the churchwardens and overseers of the poor to any justice of the peace, within forty days after any person cometh to settle himself in a tenement under the yearly value of ten pounds, that two justices of peace, *Quorum unus*, of that division where such person is likely to be chargeable to the parish, by warrant may remove him to the parish where he was last legally settled. PROVIDED, if he think himself aggrieved by the judgment of the two justices, then he may appeal to the next quarter-sessions, who are required to do justice according to the merits of the case."

An order of sessions superseding an order of two justices is not proper; but the Court will not quash it for this defect.

S. C. 2. Salk. 472.
Post. 396. 416.

* [209]

Two justices, by warrant under their hands and seals, removed a poor man from the parish of *Woking* to *Haswell*; thereupon an appeal is brought, and the sessions order was, "that the warrant of the two justices should be *superseded*, and that the party should be carried back to *Woking*."

Ante, 161.
Post. 396. 416.

Which order being removed by *certiorari*, exception was taken to it, that the justices in their sessions had no power to *supersede*

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THE KING
against
INHABITANTS
OF HASWELL.
Vide 2. Salk. 472.
475. 477. 481.
Carth. 469.
Cases in Law
and Equity, 103.

the warrant made by the two justices, because they had only power to *quash* or *affirm* it; and the word "*superfedeas*" is properly applicable to process before judgment, and not to the judgment itself: as if a man be in custody upon a writ, and then come a "*superfedeas*" to the writ, the prisoner is thereby discharged.

THE COURT were of opinion, that "*superfedeas*" was not a proper word in this case, but would not *quash* the order; but referred the matter to THE JUDGE OF ASSIZE.

Case 105.

Stokes against Oliver.

If the *vouches* in a common recovery be a *feme covert*, and under age, and appear by *attorney*, instead of vouching in *person*, or by *guardian*, THE RECOVERY is erroneous, and may be reversed after full age; but a *scire facias*, according to the practice of the Court, must first be issued to the *tennants*.

WRIT OF ERROR was brought to reverse a *common recovery*, and a *scire facias* against the *tertenants*, who are summoned and appear, and the sheriff has returned, that there is no other tenants.

The error assigned was, that *the vouchee* was a *feme covert*, and under age, and appeared by *attorney*.

If she had vouched in *person*, or by *guardian*, such a recovery should not be reversed for error after full age; because a *guardian* is made by the Court, who will not admit of any one but such who shall be answerable for the loss that the infant may sustain; but an *attorney* is made by the party, and an infant may not have discretion enough to choose an attorney who will be faithful to him (a). Therefore she appearing by attorney, and suffering a recovery, it shall be reversed for the same after the party comes of age, because it shall be tried by the country, Whether the warrant of attorney was made when under age, or not (b)? Neither can the husband, though of full age, make an attorney for himself and wife under age, to bind the inheritance of the wife; but she being the principal must be barred by her own act; and therefore she must appear in court in such manner as the law has directed by reason of her infancy. * It may be a question, Whether she can be barred by any act of her own, besides a *fine*; for she is not examined upon a *common recovery*? But this is not like the case of a fine levied by an infant, for that cannot be reversed but by the infant himself during his nonage (c): for it being the act of the Court to suffer such a one to levy a fine, the Court must therefore reform the same by inspection, which cannot be after full age.

For this reason, the recovery was reversed *nisi causa* the end of the Term.

(a) Holland v. Jackson, Bridgm. 73. See S. C. under title Darcey v. Jackson, Palm. 123. 149. 224. 1. Roll. Rep. 73. 101. Moor. 622. Cro. Eliz. 739. 774.

(b) Raby v. Robinson, 1. Sid. 321. 1. Lev. 142. See Co. Lit. 380. 3. Bac. Abr. 142.

(c) 3. Lev. 36.

Haines Barley's Case.

Case 106.

EJECTMENT for lands in *Essex* tried at bar. The plaintiff claimed as heir at law to one *James Wade*, who had issue *William Wade*, and one daughter, who was now the *Lady Bash*, and lessor of the plaintiff. *William Wade* had likewise issue, one son and two daughters, who were all dead without issue.

In what case a deed may be produced in evidence without being proved, 6. Mod. 225. 248. and post. 385, 386.

The defendant made a title under a conveyance by lease and release, dated the twenty-first of *May*, in the twenty-first year of *Charles the Second*, and made between *William Wade* of the one part, and *Haines Barley* and *John Turner* of the other part, by which the lands in question were settled upon them and their heirs to the use of *William Wade* for life; so to his first, second, and third son in tail-male; like remainder to *John, William, Haines*, and *Charles Barley*; remainder to *Haines Barley* the father; remainder to the right heirs of *William Wade* for ever.

The plaintiff then produced a deed made in the year 1633, between the said *James Wade* of the one part, and *Charles Mordant* and his wife, and *John Mordant*, of the other part; which deed was attested by three witnesses, two of which were proved to be dead, and the other could not be found: by which deed it appeared, that a *FINE* was levied, and the uses thereof were declared to *James Wade* for life, remainder to his first son, and the heirs males of his body; so to his second, third, and all other the sons of the said *James Wade* in tail-male; remainder to the issue females; then to the wife of *William Mordant* for life; remainder to *Charles Mordant* and his heirs for ever.

So that *William Wade* was tenant in tail, and could not bar the remainder without a recovery, which was then produced, and a deed to lead the uses thereof, and * livery and seisin indorsed, to make a tenant to the *præcipe*. But it happened that one *Frances Douglas* had at that time an estate for life in these lands as her jointure, but the jointure-deed could not be produced: but they proved, that in 1661 she levied a *FINE sur concessit*, and demised the same to one *Woolly* for ninety-nine years, if she lived so long, for securing the payment of four hundred pounds; which mortgage was afterwards assigned to one *Monteatz*, and both of them joined in a lease to *William Wade* for sixty years, if the said *Frances* lived so long, under the yearly rent of two hundred pounds.

* [211] Parol testimony of a mortgage made under a jointure, is evidence to shew an estate for life in esse at the time of a recovery suffered by tenant in tail, if the jointure deed be lost.

4. Com. Dig. "Evidence," (A. 4.).

This was admitted to be a sufficient proof of the jointure.

And to the like purpose they produced depositions in chancery, which they offered to be read, the bill and answer being taken off the file, and lost.

The depositions taken in chancery may be read in evidence, if Stra. 920. Cowp. 594.

the bill and answer be proved to be lost. Post. 386. 1. Mod. 4. 2. Vern. 471. 591. Skin. 584. 673. 4. Com. Dig. "Evidence" (C. 4.). 1. Atk. 445. 2. Bac. Abr. 308. 1. Salk. 278. 281, 286. 2. Salk. 555. 6. Mod. 225. 248.

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The entry of bill and answer in the Six Clerks book is evidence of their having been filed.
Hob. 112.
Bull. N. P. 240.

But they offered to give an account that it was once filed, which was by the *Six Clerks book*; and produced an inrolment of the decree, which mentioned both bill and answer.

And THE COURT was of opinion, that the jointure-deed being lost, they might supply the proof by memorials thereof, since it was impossible to shew the deed itself.

So the plaintiff had a verdict for so much as was in jointure.

Case 107.

Martin against Monke.

If a *nisi prius* roll state the issue to be before "the lord the king" and lady the queen," when in fact the queen at the time was dead; or if it mis-state the day on which the affizes were held, it cannot be amended, although the plea roll be right.
Post. 399.
1. Salk. 50.
Carth. 506.
6. Mod. 164.
268.
Bar. K. B. 31.
2. Ld. Ray. 3518.
* [212]
2. Stra. 843.
1. Bac. Abr. 300.

MOTION to amend a fault in the *jurata* after verdict found for the plaintiff at the affizes in *Sussex*:

It was "*nomina juratorum*" between the plaintiff and defendant, *de placito, &c. ponitur in respectu coram dom. reg. et dom. regina apud Westm. &c. nisi justiciar', &c. ad assisas capiend. assign. prius die, &c. vicesimo die Martii*.

It should have been *coram domino rege* only.

And the day of *nisi prius* was mistaken; for the affizes were the twenty-third of *March*.

The record was right, by which he prayed it to be amended; and for authorities, the case of *Merchant v. Reason* (a) was cited, where the record was *de placito debiti*, upon the statute 2. *Edu. 6. c. 13.* for not-letting out tithes, and the *jurata* in the record of *nisi prius* was *de placito transgressionis*; and this was amended after a verdict for the plaintiff, because it was only a misprision of the clerk. So where it was upon a *nisi prius*, that challenge was made to the sheriff after issue joined (b), and *venire facias* awarded to the coroner; but the record was, that the *venire facias* was awarded unto the sheriff, which was not entered at the time * of the trial, but is usually made up afterwards in time of vacation; yet this being only a misprision of the clerk, shall be amended by the record.

BUT ON THE OTHER SIDE it was insisted, that this was not amendable, for the Justices of *nisi prius* had no authority to take such a record. The misprision of a clerk in a writ of *nisi prius* is amendable by the statute of 8. *Hen. 6. c. 12.* but then it must have sufficient matter expressed or implied to give authority to the Judge to try the issue. for without that writ he cannot try the cause; and therefore in debt (c) against the defendant "husbandman," the question was, Whether he was so *die impetrationis brevis*? And the writ of *nisi prius*, by which the cause was tried, takes notice that the defendant was a husbandman; but the material part of the issue was left out, viz. Whether he was so

(a) *Le Merchant v. Rawson*, Cro. Car. 374. 1. Roll. Ab. 202. pl. 7.
(b) *Musgrave v. Wharton*, Cro. Jac. 354. See also *Fowls v. Child*, Cro. Jac.

396. and *Aquila Weeks' Case*, Cro. Car. 203. Palm. 378. Godb. 328.
(c) *Blackmore's case*, 8. Co. 161.

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die impetrationis brevis, or not? There was a verdict for the plaintiff; and though the record was right, the Court would not suffer the writ of *nisi prius* to be amended (a), because by that writ the Judges had no power to try the issue in the record. In all the cases where the record of *nisi prius* has been amended by the roll, the writ of *distringas* has been right; which, together with the *nisi prius*, is a sufficient authority for the Judge to try the cause (b); but here the *distringas* was wrong, for it was "*Gulielmus et Maria, Dei gratia, &c.*" which could not be; for the queen died in December, and the cause was tried the twenty-third of March following.

MARTIN
against
MONKE.

For which reason THE COURT held this not amendable.

* [213]

Thwaites and his Wife against Athfield.

Case 108.

AN ACTION OF DEBT was brought for rent upon a lease of a house to be made by three Judges, pursuant to the act for erecting a court of judicature for determination of differences concerning houses built in London, whose judgment and decrees by the said act are made a record and entered in a book, and kept by the lord mayor, with the records of the city; in which lease the rent of two pounds thirteen shillings was reserved *per annum*, and the plaintiff declared for a hundred pounds, due for so many years; and it appeared upon the record, in casting up the sums, that he had declared for eight pounds too much.

In an action of debt on a lease for rent at two pounds thirteen shillings a-year, if the plaintiff declare for one hundred pounds due for so many years arrear, and it appear that a mistake has been made, and that he has declared for eight pounds too much, yet, after verdict, if he release the eight pounds, he shall have judgment for the residue.

* The defendant pleaded "*nul tiel record*," and there was a judgment for the plaintiff, that he had produced the record.

S. C. Comb. 365.
S. C. 12. Mod. 93.
Hob. 89.
Cro. Car. 104.
137.
Hutton, 96.
Latch. 175.
2. Keb. 576.
Cro. Eliz. 22.
Yelv. 5.
1. Saund. 282.
(C. 84.).

It was moved in arrest of judgment, that this being in *debt for rent*, and an entire demand of a sum certain, the plaintiff could never have judgment, because it appeared, upon his own shewing, that he had not any cause of action for the whole. If it had been an action of *covenant* to pay a yearly rent, and the breach had been assigned for non-payment of a certain sum at such days, and the whole had not amounted to so much as demanded, that might be well enough (c); because in *covenant* damages are to be recovered according to the evidence, and not as the party hath summed it up. But my LORD COKE was of opinion, that upon *debt for rent* it was otherwise, because in that action you recover the sum demanded. In all actions of debt, the plaintiff is privy to the sum in demand, and therefore ought, at his peril, to declare for the true debt; and the reason why he ought to demand the very sum, is, because if he should do otherwise and recover, he might afterwards

Cro. Jac. 128. 499. 569. 2. Lev. 4. 5. Com. Dig. Pleader''

(a) Year Book, 11. Hen. 6. pl. 11.

(c) Ferrar v. Snelling, 1. Roll. Rep.

(b) 8. Co. 166. Carth. 506. Salk. 335. S. C. 3. Bulst. 145.

48. 88. Post. 399. 1. Bac. Abr. 100, 101.

bring

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bring an action for the true sum, and so the defendant would be doubly charged; and therefore in debt upon a bond, if the plaintiff declare for less than due, he shall never have judgment (a).

To which it was answered, that though the action was for an entire sum, yet it was made up of several rents to be paid at divers days, and so must be taken as several demands for the rent; as where debt was brought upon three bonds, and upon *oyer*, the defendant pleaded condition performed, and there was a verdict for the plaintiff. Now though the plaintiff could not have judgment as found by the verdict, yet releasing damages and costs, he had judgment for the two first bonds (b). So where the defendant avowed for five pounds rent, and a *nomine pænæ* for non-payment at the day, but laid no actual demand of the rent, the avowry was held naught as to the *nomine pænæ*, because it could not be forfeited without a demand of the rent; yet he had judgment for the return of the cattle, because he had a lawful cause to distress for rent arrear, and the demands were several (c). The like judgment was given where a plaintiff brought an action of debt for forty pounds upon the statute of *Usury*, and declared, that the defendant *corruptivè* did lend forty pounds *contra formam statuti*, and such a day did also lend twenty pounds *contra formam, &c.* but * did not say *corruptivè*; upon *non debet* pleaded, the plaintiff had a verdict; and it was moved in arrest of judgment, that the declaration was not good for the last twenty pounds, because it wanted the word *corruptivè*; but the Court gave judgment for what the plaintiff had well declared; and *nil capiat per billam* was entered as to the residue (d). So it would have been if it had been upon demurrer. But there is a later book which seems to warrant this case, in which the case of *Dupper v. Baskervill* (e) is reported, which was an action of debt for arrear of rent, in which the plaintiff declared for more rent, and for a longer time than upon his own shewing appeared to be due to him; which the defendant perceiving, pleaded *nil detinet*, but concluded his plea with *hoc paratus est verificare*, and not to *the country* as he ought to do, on purpose that the plaintiff might demur; which was done accordingly, and had judgment against the defendant for the ill conclusion of his plea: but the plaintiff afterwards finding his mistake, he entered a *remittitur* for so much in the declaration more than was due to him, and took his judgment for the rest; and thereupon the defendant brought a writ of error in the exchequer chamber, and this very exception was taken to the declaration, and all the cases before-mentioned were cited, to prove that the plaintiff might release the surplussage before judgment, which if he had neglected, the Court ought to give judgment for so much as was well demanded in the declaration. And this

* [214]

(a) *Pemberton v. Shelton*, 2. Roll. Rep. 54. 4. Bac. Abr. 26, 27. Symmons v. Knox, 3. Term Rep. 65.

(b) *Andrew v. Delahay*, Hob. 178.

(c) *Howell v. Sambech*, Hob. 133.

(d) *Woody's case*, Cro. Jac. 104.

(e) 1. Saund. 282. S. C. 2. Keb. 576.

(seems

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seems agreeable to the fourth rule in *Godfrey's Case* (a), That if a man bring an action for several things, and upon his own shewing it appear that he cannot have an action for one thing, the writ shall not abate for the whole, but he shall recover for what the action will lie, and be barred for the rest. And lastly, for a case in point, that of *Barber v. Pomeroy* (b) was cited, which was debt for rent as this is; and the plaintiff had declared for more than was due upon his shewing, and upon *nil debet* pleaded the plaintiff had judgment, and damages and costs; and it was moved in arrest of judgment, for the plaintiff had made an entire demand for rent to a certain sum, when it appeared that he could not have an action for so much; yet the Court held that he might release the surplus and damages, and take judgment for the residue. * It is true, my LORD HALE said, that judgment was never given in this case; but my LORD ROLLE cites *the Number-Roll*, and *the Term* when it was entered. If this had been pleaded in *abatement*, the action had been discharged; but the Court *ex officio* are not bound to abate it, especially since the defendant had waived that matter, and pleaded *nul tiel record*, and insisted upon the right.

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AND HIS WIFE
against
ASHFIELD.
1. Saund. 285.
Pal. 524.
Yelv. 71.

* [215]

THE COURT was of opinion, that if an action of debt be brought upon several bonds, and it appear that one is not due, the plaintiff may recover the rest. So here the plaintiff demands a hundred pounds upon several arrears of rent, and it appears that the whole is not due, but falls short ten pounds, he may recover for the residue.

1. Saund. 284.
1. Sid. 417.
Comb. 365.

(a) 11. Co. 45. Yelv. 71.

(b) 1. Roll. Abr. 785. Stiles, 175.

Memorandum.

Case 109.

IN the vacation after this Term, died SIR WILLIAM GREGORY, Knight, one of the Judges of the court of king's bench: he was succeeded in his office by SIR JOHN TURTON, Knight, who was removed out of the exchequer; and BLENCOWE, Serjeant, was made one of the barons of the exchequer in his place.

1. Ld. Ray. 36.

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TRINITY TERM,

The Eighth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* [216]

Case 110.

* DORSET, } DOMINUS REX mandavit vic. com. præd.
ff. breve suum clausum in hæc verba, *ff.* WILLI-
 ELMUS TERTIUS Dei gra. Angl. Scot. Franc. et Hibern. rex,
fidei defensor, &c. vic. DORS. salutem. Præcipimus tibi sicut alias
tibi præcipimus quod capias BONHAM STRANGEWAIES ar. et
JOHANNEM DOE si invent. fuerint in balliva tua et eos salvo
custod. ita quod habeas corpora eorum coram nobis apud WESTM.
die Mercurii prox. post tres sep. Sanctæ Trinit. ad responden.
ROBERTO FOREST et SUSANNÆ ux. ejus de placito transgr.
ac etiam bil. ipsius ROBERTI et SUSANNÆ versus ipsum BONHAM
pro cent. libr. secundum cons. cur. nostr. coram nob. existen. et habeas
ibi tunc hoc breve. Teste JOHAN. HOLT mil. apud WESTM. sexto die
Maii anno regni regis septimi.

HOLT & COLMAN.

Executio istius brevis patet in quadam schedula huic brevi annex.

WILLIELMUS BENNET *Ar. Vic.*

Virtute istius brevis mihi direct. et huic schedulæ annex. quoddam
 warrant. meum sub manu mea et sigillo officii mei vic. com. mei
 infrascript. feci et direxi THOMÆ MEREST al. MERRICE
 JOHANNI HINTON et EDUARDO GRIMSTED ballivis meis in
 hac parte ad arrestan. et capien. BONHAM STRANGEWAIES ar. in
 dict. brevi nominat. secund. exigen. ejusd. brevis; qui quidem
 THO.

THO. MEREST *al.* MERRICE et JOHANNES HINTON *ballivi mei virtute warrant. mei præd. decimo die Maii anno regni dom. nostri WILLIELMI TERTII infrascript. septimo apud PORTLAND in com. meo DORSET ceper. et arrestaver. præd. BONHAM STRANGEWAIES et ipsum in custod. sua adtunc et ibidem habuer. et detin. et sic in custod. sua adtunc et ibid. existen. postea scilicet eisdem die et anno quidam THOMAS GILBERT de PORTLAND præd. yeoman, WILIELMUS ELLIOT de ead. yeoman, JOHANNES OYLES de eadem yeoman, ROBERTUS OYLES de ead. yeoman, CHRISTOPHORUS WITT de eadem yeoman, EDWARDUS GLOVER de eadem yeoman, JOHANNES FARR de eadem yeoman, JOHAN. WHITE de eadem yeoman, et JOHANNES PETERS de eadem yeoman, adtunc*

* [217] * et ibidem vi et armis, &c. viz. baculis, gladiis, sclopiis, ANGLICE "pistois," et cultellis, adtunc et ibidem ristoſe, roustoſe, et illicite in ipsos THO. MEREST alias MERRICE ballivos meos insult. fecer. et ipsos verberaver. vulneraver. et maletraxer. ita quod de vitis eorum desperabatur. et præfat. BONHAM STRANGWAIES a dictis ballivis extra custod. suos contra voluntates eorundem ballivorum adtunc et ibidem vi et armis, &c. ceper. et rescuffer. et ipsum BONHAM STRANGWAIES ad largium ire posuer. et permiser. ac idem BONHAM STRANGWAIES seipsum extra custod. ballivorum contra voluit. eorum ballivorum adtunc et ibidem similiter rescufferunt et rescussit contra pacem dicti domini regis nunc coron. et dignitat. suas, &c. Et postea idem BONHAM STRANGWAIES ante retorn. brevis præd. non est invent. in balliva mea.

W. BENNET, *Ar. Vic.*

Case III.

Bonham Strangewaie's Case.

If the return of a rescue be, that *A. B.* was in the custody of three of the bailiffs, and that the defendants "*vi et armis*" on *ballivos meos*" made an assault, and "*a custodia ballivorum meorum*," "*&c.*" the said *A. B.* did rescue, is bad.

6. Mod. 141.
173. 210.
3. Mod. 114.
4. Bac. Abr.
403. 404.

THE SHERIFF OF DORSETSHIRE returned, that by virtue of a writ to him directed, he made a warrant to three bailiffs to arrest *Bonham Strangewaies, Esq.* which said bailiffs did take him, and had him in their custody; and that one *Gilbert* and others, *vi et armis*, on *Thomas Merrice* "*ballivos meos insultum fecerunt, &c.*" and the said defendant "*adtunc et ibidem a custodia ballivorum meorum et contra voluntates suas*," did RESCUE.

Exception was taken to this return, for that the rescous was alledged to be *ex custodia ballivorum*; whereas it should have been *ex custodia vicecomitis*, because the sheriff, and not the bailiff, is the officer of this court, and the process is directed to him. In the thirtieth year of *Henry the Sixth* (a), a writ was directed to the coroners of *Surrey* to arrest a man, and one of them made a return in his own name alone, that he had made a warrant to his servant to arrest the defendant named in the writ, who took him, and that afterwards he was rescued from his said servant, when it should have been from himself; for the arrest by the servant is the arrest made by the master, and by consequence the rescous must be from him. And ever since that case this has always been allowed to be a

(a) Year Book 39. Hen. 6. pl. 42. Bro. Abr. "Rescous," pl. 15.

Trinity Term, 8. Will. 3. In B. R.

good exception to a return of rescous, where the party is indicted for it, and rescued out of the custody of the sheriff's bailiff (a). But it may be otherwise if he had been rescued from a bailiff of a particular liberty, because he is an officer known in law (b).

* In the nineteenth year of Charles the Second the like exception was taken to a return of a rescous: and TWISDEN, Justice, affirmed in this court, that it had been ruled both ways: but KELYNGE, Chief Justice, was of another opinion, and that it had been usually quashed for this reason. It is true, if an action on the case be brought against the party for a rescous, there the plaintiff may declare *secundum veritatem facti*, that the defendant rescued the prisoner out of the custody of the sheriff's bailiff or deputy: but if he be indicted for it, then it must be *secundum veritatem in lege*, viz. that the prisoner was rescued out of the custody of the sheriff himself. [218]

BONNARD
STRANGE-
WAIRE'S CASE,

8. Mod. 357.

But because it was returned, that the party was in custody of three of the bailiffs, and the defendants *insultum fecerunt* upon one, which the sheriff called *ballivos meos*; for that reason it was quashed.

(a) Cro. Car. 212. 2. Roll Rep. 73. (b) Litt. Rep. 236. March, 92. Hely, 145. Stiles, 417. 1. Sid. 332.

The King and Queen against Thorp and Others.

Case 112.

Hilary Term, 6. Will. 3. Mary, Roll

SOUTHAMPTON, } BE IT REMEMBERED, that EDWARD
to wit, } WARD, Knight, attorney general of our
present lord the king and lady the queen, who for our said present
sovereign lord the king and lady the queen in this behalf prosecutes
in his proper person, comes here into court of our said present
sovereign lord the king and lady the queen, before the KING and
QUEEN themselves, at Westminster, on Tuesday next after the octave
of Saint Hilary in this same Term, and for our said present
sovereign lord the king and lady the queen, gives the Court here
to understand and be informed, that Henry Thorp, late of Reading,
in the county of Berks, gentleman; Ursula Holton, late of London,
widow; Thomas Deer, late of Winton, in the county of Southampton,
yeoman; Anne Deer, wife of the aforesaid Thomas; Elizabeth
Streper, wife of William Streper, late of Reading, in the county of
Berks, gentleman, otherwise called Elizabeth Streper, late of
Reading aforesaid, in the county aforesaid, widow, otherwise called
Elizabeth Streper, late of the same, spinster; and Francis Harguile,
late of Reading, in the county of Berks, yeoman; being persons,
and each of them being a person, of evil name, fame, and dishonest
conversation, and disregarding the laws of this realm of England,
on the tenth day of October, in the fifth year of the reign of the
Lord William and the Lady Mary, of England, Scotland, France,
king and queen, defenders of the faith, &c. and on divers other
days

AN INFORMATION by the attorney general against several persons for conspiring to marry a young gentleman of fortune with a woman of inferior character and condition.

Trinity Term, 8. Will. 3. In B. R.

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AND QUEEN
against
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AND OTHERS.

days and times, as well before as after, at *Winton*, in the county of *Southampton*, wickedly, deceitfully; and unlawfully, conspiring, contriving, and intending, one *Edward Mitchell*, gentleman, being within the age of eighteen years, and the son and heir of one *Robert Mitchell* (a), of *Petersfield*, in the county of *Southampton*, esquire, out of the custody, counsel, and government of the said *Robert Mitchell*, without notice, and against the will of the said *Robert Mitchell*, to take and seduce, and with one *Cornelia Holton*, a person of bad name, fame, and dishonest conversation, and also of no fortune or substance, the same *Edward Mitchell* in matrimony to join, and in pursuance of the said conspiracy, contrivance, and diabolical intention, the said *Henry Thorp*, *Ursula Holton*, *Thomas Deer*, *Anne Deer*, *Elizabeth Streper*, and *Francis Harguile* afterwards, to wit, on the aforefaid tenth day of *October*, in the fifth year of the lord the now king and the lady the now queen above-mentioned, at *Winton* aforefaid, in the county aforefaid, wickedly, unjustly, and unlawfully, confederated and assembled themselves; and that the same *Henry Thorp*, *Ursula Holton*, *Thomas Deer*, *Anne Deer*, *Elizabeth Streper*, and *Francis Harguile*, afterwards, to wit, on the same day and year aforefaid, at *Winton* aforefaid, in the county of *Southampton* aforefaid, in execution of THE CONSPIRACY aforefaid so as beforementioned between them, falsely, maliciously, unjustly, and deceitfully had, by divers false, malicious, and deceitful ways, did inveigle and persuade, and each of them the aforefaid *Henry Thorp*, *Ursula Holton*, *Thomas Deer*, *Anne Deer*, *Elizabeth Streper*, and *Francis Harguile*, then and there did deceive and persuade the said *Edward Mitchell* the said *Robert Mitchell* his kind and tender father to hold in hatred and contempt, and also to relinquish and abdicate the school at *Winton*, in the county of *Southampton* aforefaid, where the said *Edward Mitchell* to be instructed and educated in sound literature and good morals, was by his said father before that time placed, and also the house of him *Henry Thorp*, being at *Winton*, in the county of *Southampton* aforefaid, to frequent. And the same *Henry Thorp*, &c. by divers iniquitous and false solicitations then and there did persuade and unlawfully compel, and each of them the aforefaid *Henry Thorp*, &c. did persuade and compel, the said *Edward Mitchell* divers very strong and intoxicating waters and liquors to drink, and the aforefaid *Edward Mitchell* then and there made and caused to be made, and each of them made and caused to be made, drunk. And also with the aforefaid *Cornelia Holton* then and there, and on the aforefaid other days and times afterwards, in company, the aforefaid *Edward Mitchell* deceitfully and craftily introduced and procured, and by divers flattering, false, and deceitful speeches and words, unlawfully and deceitfully then and there persuaded and solicited the aforefaid *Edward Mitchell* the said *Cornelia Holton* to join in matrimony. And the said ATTORNEY GENERAL of our said lord the king and lady the queen, for the said lord the king and lady the

(a) Doth not say that *Mr. Mitchell* was a man of an estate.

queen,

queen, gives the court here further to understand and be informed, that the same *Henry Thorp*, *Ursula Holton*, *Thomas Deer*, *Anne Deer*, *Elizabeth Streper*, and *Francis Harguile*, in the further prosecution of their machination and intention aforesaid, afterwards, to wit, on the sixteenth day of *October*, in the fifth year of the reign of the lord the now king and lady the now queen, at *Winton* aforesaid, in the county of *Southampton* aforesaid, unlawfully, falsely, and wickedly, and by divers false asseverations and promises, solicited, incited, and procured the same *Edward Mitchell* from his school aforesaid frequently to stay, and thencefrom to depart, against the will and without notice or consent of the aforesaid *Robert Mitchell* his father; and also the same *Edward Mitchell*, without notice, and against the will of the said *Robert Mitchell*, then and there received, maintained, and kept, with intention to deceive and persuade the same *Edward Mitchell* in matrimony with the aforesaid *Cornelia Holton* to join: and that the aforesaid *Cornelia Holton* afterwards, to wit, on the twentieth day of *October*, in the aforesaid year of the reign of the said lord the now king and lady the now queen abovementioned, at *Watlington*, in the county of *Oxford*, by the abetment and aforesaid false means of the said *Henry Thorp*, &c. contracted matrimony with the said *Edward Mitchell*; to the great damage of the said *Edward Mitchell*; to the misery, disconsolation, and sorrow, of the aforesaid *Robert Mitchell*, the said father to the said *Edward Mitchell*, and all his friends; in manifest contempt of the laws of this realm of *England*, in evil example of all others in like case offending, and against the peace of our said lord the now king and lady the now queen, their crown and dignity, &c. Whereupon the said ATTORNEY GENERAL of our said lord the now king and lady the now queen for the said lord the king and lady the queen prays the consideration of the court here in the premises, and that due process of law may be awarded against them the aforesaid *Henry Thorp*, &c. in this behalf, to make them answer to our said lord the now king and lady the now queen of and in the premises aforesaid, &c.

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And THE JURORS, &c. say, that the defendants *Ursula Holton*, *Thomas Deer*, *Anne Deer*, the wife of the said *Thomas*, *Elizabeth Streper*, the wife of *William Streper*, and *Francis Harguile*, are NOT GUILTY; and that the defendant *Thorp*, as to all things in the information contained, except compelling the said *Edward Mitchell*, in the information aforesaid mentioned, to drink the strong waters and liquors in the information aforesaid, is GUILTY; and as to the compelling the said *Edward Mitchell* to drink the waters and liquors aforesaid the jurors aforesaid say, that the defendant *Thorp* is NOT GUILTY.

Case 113.

* The King and Queen against Thorp and Others.

A father has the guardianship of his son and heir apparent until he attains the age of twenty-one years; and therefore the Court will grant an information for maliciously conspiring to inveigle a young man, heir to a considerable estate, and under the age of eighteen, out of the custody and government of his father, and seducing him into a disgraceful marriage.

- S. C. Carth. 384.
- S. C. Comb. 456.
- S. C. Holt, 333.
- S. C. Comy. 27.
- 1. Salk. 14, 15.
- 61.
- 2. Salk. 456.
- 1. Mod. 4.
- 3. Mod. 306.
- 1. Lev. 275.
- 1. Lutw. 122.
- 1. Vent. 12. 18.
- 25.
- 1. Sid. 424.
- 6. Mod. 261, &c.
- 1. Burr. 606.
- Andr. 310.
- Str. 1107.
- 1162.
- 1. Bac. Abr. 62.
- 3. Bac. Abr.
- 578.
- 2. Hawk. P. C.
- ch. 26. f. 8.

INFORMATION against *Thorp* and others, setting forth, that they and each of them, being persons of ill fame, did, on the tenth of *October*, in the fifth year of *William and Mary*, and at divers other times, as well before as after, wickedly, unlawfully, and deceitfully, conspire, at *Winchester*, to take one *Edward Mitchell*, being under age of eighteen years, and the only son and heir of *Robert Mitchell, Esq.* and to carry him out of the custody, counsel, and government of his said father, without his notice, and against his will, and to marry him to *Cornelia Holton*, a person of ill name, and of no fortune; that the defendants did unlawfully assemble themselves together to accomplish the said conspiracy and wicked intentions; that they, and every one of them, by divers false, malicious, and deceitful insinuations, did falsely, unjustly, maliciously, and deceitfully persuade the said *Edward Mitchell* to hate his father, and to leave *Winchester School*, where he was placed by his father for his learning, and to frequent the house of the defendant *Thorp* at *Winton*, and did persuade the said *Edward Mitchell*, and by divers false allurements did compel him to be drunk with strong waters and other liquors; and that they introduced *Cornelia Holton* into his company, and did unlawfully and deceitfully, by false speeches, persuade and solicit him to be married to her; that in further prosecution of their intentions the defendants, and every of them, on the sixteenth of *October*, in the fifth of *William and Mary*, did, by divers false assurances and promises, solicit, invite, and procure the said *Edward Mitchell* to leave the said school, against the will and without the notice or consent of his father, and did receive, maintain, and keep him, with an intent to persuade him to marry the said *Cornelia Holton*; that the said *Cornelia Holton* did contract matrimony with the said *Edward Mitchell*, on the twentieth day of *October*, in the fifth year aforesaid, at *Watlington*, in the county of *Oxford*, by the abetting and false means of the said defendants, to the damage of the said father, &c.

Upon *not guilty* pleaded, this information was tried at the assizes at *Winchester*, and all the defendants were found *not guilty*, except *Thorp*, and he was acquitted of compelling the said *Mitchell* to be drunk, and found *guilty* of all the rest in the information.

It was moved in arrest of judgment; and the exceptions taken were,

* [222]

FIRST, That this information does not contain any matter of misdemeanor.

SECONDLY, It is laid by way of *conspiracy*, and the defendant *Thorp* being only found *guilty*, there can be no judgment against him, because one cannot conspire.

THIRDLY, Here is a *mistrial*; for the conspiracy being laid in *Hampshire*, and the marriage being in *Oxfordshire*, it ought not to

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be tried by a jury of *Hampshire* alone, but by a jury of both counties.

As to THE FIRST POINT, Here is no misdemeanor laid in this information : for by the laws of *England* a young man of the age of fourteen years and upwards may dispose of himself in marriage ; and it is no offence to persuade him to marry, though it be to a woman of mean fortune ; and without the consent of the father ; for he cannot have an action for the loss of the marriage of his eldest son and heir, except where he be taken by force and married : for an action will not lie for any solicitation, because people may differ in opinion ; one man may think it a convenient match, and another may be of a contrary opinion ; therefore the plaintiff ought to shew, that the defendant did solicit or procure his son to be married by some unlawful means. The information is too general ; he should have shewed a particular offence. Besides, it does not appear that either the young man or his father had any estate real or personal : it is said, he was son and heir of *Robert Mitchell*, but *non constat* that he had any estate.

As to THE SECOND POINT, The intent of this information was to make these defendants guilty of *conspiracy*. Every act which is laid to be done by them is in order to accomplish a joint intention ; for it is laid, that all the defendants did wickedly, &c. conspire, endeavour, and intend to get the son out of the government of his father, and marry him, &c. which is a joint act. If it had not been laid by way of *conspiracy*, it should have been *quilibet eorum* did endeavour and intend, &c. so that all being acquitted but *Thorp*, the verdict has falsified the information ; for one cannot conspire.

As to THE THIRD POINT, This information consists of two parts ; the persuading the young man to marry the woman, which is laid to be in *Hampshire* ; and the execution of their design, which is marriage itself, and that is laid to be in *Oxfordshire* ; which being two facts in different counties, ought not to be tried by a jury of one county alone, but both ought to join. If a man forge a deed in one county, and publish it in another, the trial shall be by a jury of both counties ; for the writing, as well as the publication of that writing, is material (a). So in *replevin*, the defendant said, that the *locus in quo*, &c. contained four acres in *Coningham*, which was his freehold, and so justifies the taking *damage feasant* ; the plaintiff in bar to the avowry pleaded, that the *locus in quo*, &c. was parcel of a greater common field in *Coningham*, and that he *prædicto tempore*, &c. was seised in fee of a messuage, and fourteen acres of meadow and pasture thereunto belonging, and prescribed to have common for his farmers and tenants of the said messuage for his cattle *levant et couchant tanquam ad tenementum præd. spectant.* ; and upon this an issue was taken, and a verdict

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Cro. Eliz. 55.
1. Leon. pl. 63.
Jones, 411,
pl. 4.
Style, 216.

1. Roll. Abr.
111.
Cro. Eliz. 701.
Cro. Jac. 194.
Cro. Car. 239.
3. Mod. 220.
1. Hawk. P. C.
c. 72. f. 8.

* [223]

If, in an information for a conspiracy, the conspiring be laid in one county, and the execution of the design in another county, it may be tried in either county.

2. Roll. Abr.
601. 607.
Hob. 330.
2. Brown. 272.
Skin. 43.
1. Sid. 405.
Comb. 75. 115.
1. Salk. 174.
2. Salk. 669.
2. Lev. 121.
2. Term Rep.
238. 241.

3. Term Rep. 387. 652.

(a) Year Book 4. Hen. 6. pl. 4. 2. Roll. Abr. 607.

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for the plaintiff; but the judgment was stayed, because it was not set forth in the bar where the messuage and land was to which the common did belong (a); which ought to be, because the *venire facias* must be where the house and land were, and not where the common was, for that may be either appurtenant or appendant to land in another county.

E contra. As to THE FIRST OBJECTION it was answered, that there is a plain offence set forth in this information; and this appears upon the very reading of it.

SECONDLY, It is not only an information grounded upon a conspiracy, but it is laid by way of aggravation in the beginning; and when the particular facts are set forth, there it is alledged, that *quilibet eorum* did wickedly persuade, &c. In *Easter Term*, in the twentieth year of *Charles the Second*, an action was brought in this court (b), grounded upon a *tort*, wherein the plaintiff declared against the defendant, that *per conspirationem inter eos habitam*, and to oppress and impoverish the plaintiff, they caused a * *plaint* to be levied against him in the sheriff's court of *London*, and the plaintiff to be arrested, &c. and upon not guilty pleaded, they were all acquitted but one, as in this case, and the like exception was then taken in arrest of judgment; but the Court were of opinion, that notwithstanding these words "*per conspirationem, &c.*" it was an action on the case, the substance whereof was the illegal arresting the plaintiff, and not the conspiracy, and that being found by the jury, the plaintiff had his judgment (c). That which is lawful for one man to do, may be made unlawful to be done by conspiracies: for instance, it is lawful for any brewer to brew small-beer, but if several shall conspire together to brew no strong but all small beer, on purpose to defraud the king of his duties, such conspiracy is unlawful. And so it was held in *Sir Samuel Sterling's Case* (d), who, because he could not farm the excise, did confederate with several brewers to brew small-beer only.

• [224]

2. Salk. 169.

THIRDLY, It is true, if a deed be forged in one county and published in another, these are several and distinct offences, and therefore shall be tried by different juries (e). So in the case of a common in one county, by reason of lands in another, if an action of trespass be brought for feeding in the common, and the defendant justifies by reason of a prescription as belonging to lands in another county, there, if issues be taken upon the prescription, it must be tried in the county where the land lies, and not where the common is (f). But in an indictment the counties are never joined.

(a) *Broxolme v. Thorold*, Yelv. 177.

(b) *Skinner v. Gunton*, 1. Saund. 218.

(c) NOTE, MORTON was of another opinion; and SAUNDERS himself was also of opinion, that the plaintiff should not have judgment, because by these words "*per conspirationem*" it seemed

to be a formed action of conspiracy, and the declaration was falsified by the verdict, one of the defendants being only found guilty. Vide 1. Saund. 228, 229.

NOTE to former edition.

(d) 1. Sid. 174. 1. Lev. 125.

(e) See *French v. Kent*, Raym. 33.

(f) Co. Lit. 154.

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CURIA. It is a misfortune that the marriage is good (a); it is true, it is lawful to marry, but if it be obtained by unlawful means, it is an offence (b). The question is, Whether a father has not the guardianship of his son and heir apparent till the age of twenty-one years (c), as he had when there was tenure in knight's service? For the father has such an original right invested in him by nature, that he might have an action of trespass against the lord, *quare filium et heredem suum rapuit*.

Adjournatur (d).

(a) But see the Marriage Act, 26. Geo. 3. c. 30.

(b)

(c) Co. Lit. 84.

(d) This case was moved again in Easter Term, 9. Will. 3. and HOLT, Chief Justice, said, that the father is the guardian to his son until the age of twenty-one years, by our law, which is founded upon the laws of nations; but he has only remedy in case of his eldest son, S. C. Comy. 27. And THE COURT were of opinion, that it was a great crime and worthy to be punished, if they could

any way come at it, S. C. Comb. 458. But no judgment was given, S. C. Carth. 386. 2. Hawk. P. C. c. 26. f. 1. But in the case of Rex v. Twifelden, it was agreed by all the Judges, that this is an offence at common law for which an information will lie, 1. Sid. 387. S. C. 1. Lev. 257. See also Rex v. Serles and Others, Cro. Car. 557. in point; Lord Grey's Case, Skin. 81. Ray. 259. 2. Hawk. P. C. ch. 26. f. 1. 1. Black. 386. ; and Reg. v. Blacket and Robinson, 7. Mod. 39.

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Carth. 386.

* Newnham against Lunn.

AN ACTION of debt was brought by a common informer upon the statute 23. Hen. 6. c. 10. against the defendant, for taking five shillings and sixpence for an arrest on a bond.

The statute enacts, "That the sheriff shall have twenty-pence, and the bailiff who makes the arrest four-pence, and that the sheriff or bailiff who doth contrary, shall pay treble damages to the party grieved, and forfeit the sum of forty pounds, one moiety to the king, and the other to the party that will sue: and that the justices of assize in their sessions, justices of the one bench and of the other, and justices of peace in their county, may determine the said offences."

There was a verdict for the plaintiff.

It was moved in arrest of judgment, for by the statute of 21. Jac. 1. c. 4. "all offences committed against any penal statute, for which any common informer may have a popular action, bill, plaint, suit, or information, shall be prosecuted in the counties where the offence was committed, and not elsewhere;" and so it was adjudged in this court, in the case of *Nicholes v. Cockerill* (a); for if debt will lie here by a common informer upon a penal law, then the statute of 21. Jac. 1. c. 4. will be wholly avoided (b).

* [225]
Case 114.

Q^a. If debt by a common informer, on the statute 23. Hen. 6. c. 10. for penalty for extortion on an arrest, must be brought in the proper county?

S. C. Comb. 370.
Post. 425.
1. Salk. 373.
Sellon's Pract. 133.

(a) Easter Term 27. Car. 2.

(b) See *Shiffman v. Henbert*, 4. Term Rep. 109.

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NEWNHAM
against
LUNN.

The action was brought in *Lon Lon*, and the offence was committed in *Buckinghamshire*,

Adjournatur.

Case 115,

Jones against Bodinham.

In trespass, if the defendant justify under an impossible writ, and there is a verdict for the plaintiff, the judgment shall be entered on the confession and not upon the verdict.

IN trespass for taking cattle, the defendant pleads, that in *Hilary Term*, in the sixth year of *William and Mary*, a writ issued out of this court, reciting that such a one was outlawed; whereupon the sheriff was commanded to levy the goods into the king's hands, &c.; that this writ was delivered to the sheriff, who made a warrant directed to an officer to levy the goods, &c. who, by virtue of that warrant, took the cattle upon part of the lands contained in the outlawry. The plaintiff replies, that he did not take the goods upon those lands. Upon which issue was joined, and there was a verdict for the plaintiff.

S. C. post. 310.

* [226]

S. C. 1. Salk.

173.

S. C. 1. Ld.

Ray. 90.

S. C. Comb.

379.

S. C. Carth. 370.

S. C. Holt, 149.

S. C. Comy. 8.

Cro. Jac. 251.

Cro. Eliz. 214.

Ld. Ray. 924.

Stra. 873.

1. Com. Dig.

"Amendment"

(O.).

Comy. 548.

1. Burr. 199.

Cro. Eliz. 217.

214.

Moor, 867.

Hob. 326.

Ray. 458.

1. Sid. 218.

3. Mod. 355.

And now it was moved in arrest of judgment, that the justification of the defendant consists in three parts, *a writ*, * and *a warrant*, and *taking the cattle* upon the land: now there could be no such writ, for there was no such Term as the sixth of *William and Mary*, for THE QUEEN died before.

The question therefore was, Whether this ill pleading of the writ had made the whole plea void? If so, then it was said, that issue being taken upon a void plea, which contained no matter of bar, the verdict therein was void also.

IT WAS SAID for the plaintiff, that issue was not taken upon the bad part of the plea, but upon the taking of the cattle upon the land. Now the defendant had admitted the taking, but avoided it, by saying that it was in such a place, which *prima facie* is a good defence and justification; and though the issue be joined upon a thing not material, yet, after verdict, it is aided by the statute 32. Hen. 8. c. 30. of *feofails*, which helps mispleading, insufficient pleading, and misjoining of issue after an issue tried.

BUT IT WAS SAID for the defendant, that this plea contained no matter of bar, because there could be no such writ under which he justified; and if there be no bar, there can be no issue, and so not aided by the statute. If the defendant plead a proper plea, though it be not full, it is aided by the statute; and therefore in all cases where issue is taken upon an insufficient plea in bar, and which would have been ill upon demurrer, it is held, that, after a verdict, the defendant shall not take advantage thereof (a); but here is no plea at all, for it is merely void. Therefore in trespass (c), where the defendant pleaded a *concord* in bar, but not with satisfaction, issue being taken upon the concord, the plea was ill for want of satisfaction being pleaded; yet it was not wholly void,

(a) 4. Bac. Abr. 89.

(b) Bartholmew v. Dighton, Cro. Eliz. 778. 1. Roll. Abr. 225. Moor, 696. because

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against
BODINHAM.

because *concord* was a good plea to such an action, though not so fully pleaded as it might. So in debt upon a single bill, payment without an acquittance is an ill plea (a); yet it is a proper plea to such an action, and the issue being found for the plaintiff, he shall have judgment. So in debt for rent upon a lease for years (b), entry is a proper plea, but not good without saying that he did expel and hold him out; yet if issue be taken upon *non intravit*, and found for the defendant, he shall have judgment. But here is no matter of bar in this plea, and therefore an issue joined upon it is void (c). * To this purpose there was a case in this court (d), in trespass for taking his cattle; the defendant justified for an amercement in a court leet, for which he prescribed to distrain the cattle of any which came within the manor, and were in the possession of any amerced; and says, that they were in the possession of such a person, who was amerced, &c.; and issue was taken that they were not in his possession, and there was a verdict for the plaintiff, and a writ of error brought, and the error assigned, that the issue was joined upon a thing merely void; for the prescription being void, there is no matter of bar to the action; and the judgment was traversed. The plaintiff cannot have judgment upon this verdict for the damages found, because issue is joined upon a void plea; and therefore the Court may award a judgment against him (e), as by *nil dicit*, and so the plaintiff may have a new writ of enquiry of damages. There was a case in *Michaelmas Term*, in the first year of *Charles the First* (f), in this court, which was debt upon a bond against an administrator, dated the twentieth of *May*, in the twentieth of *James the First*; the action was commenced in *Hilary Term*, in the last year of *King James*, and entered in *Easter Term*, in the first of *Charles the First*, and then the defendant pleaded a judgment upon another bond, dated *anno quarto regis nunc*, which was impossible, it being the first year of the king, *ultra quod*, &c.; the plaintiff replies, that recovery was by fraud; and issue thereupon, which was found for the plaintiff; and the defendant moved in arrest of judgment, for that it was impossible in the first of the king that a recovery should be in the fifth year, and therefore no judgment could be given upon this issue; yet the plaintiff had judgment. But this is no authority against this case, because that was debt against an administrator who had pleaded a false plea, which was found against him, and had not confessed assets, but only to satisfy that judgment.

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CURIA. When issue is joined upon an ill plea, and a verdict for the plaintiff, yet he shall have judgment; for the defendant shall not take advantage, after a verdict, of his ill pleading. As in ejectment (g) the defendant pleaded, that one *Ridler* was seized in

(a)

(b) Reynolds v. Buckle, Hob. 326.

2. Roll. Abr. 709.

(c)

(d) Lovelass v. Grimden, Cro. Eliz.

227.

(e) Lacy v. Reynolds, Cro. Eliz.

224. 2. Roll. Abr. 99.

(f) Knight v. Harvey, Cro. Car.

25.

(g) Johns v. Ridler, Cro. Jac.

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[228]

fee, and made a lease to him for five years, by virtue whereof he was possessed, until the lessor of the plaintiff entered and disseised him, and made a lease to the plaintiff; that thereupon he re-entered and ejected him, *prout ei bene licuit*; the plaintiff replies, that his lessor was seised in fee, and leased * to him, and the defendant ousted him, *ABSQUE HOC* that he did disseise the defendant; upon which issue was joined, and found for the plaintiff. Now this was a very vain issue, for it is impossible that a lessee for years should be disseised; but the defendant shall not take advantage of such an ill plea, but having confessed a lease made to the plaintiff, and it being that he did not disseise the defendant, the judgment is well given, for it stands with the law, that the plaintiff did not disseise him; but if there had been a verdict for the defendant, he could not have judgment, for then the jury would have found, against the law, that a termor was disseised (a).

(a) The verdict was set aside, and a writ of enquiry awarded, because the issue being immaterial the jury had no power to enquire of damages, and judgment was entered for the plaintiff on the confession. S. C. 1. Salk. 173. S. C. 1.

Ld. Ray. 90. S. C. Comb. 380. See Lacy v. Reynolds, Cro. Eliz. 214.; Pitts v. Polchampton, 1. Ld. Ray. 390.; Rex v. Philips, 1. Burr. 292.; Craven v. Hanley, Comy. Rep. 548.

Case 116.

Hartop against Holt.

A writ of error
in the EXCHE-
QUER, as well
on the judgment
as in the award-
ing execution.

S. C. 3. Ld.
Ray. 73.

WILLIAM THE THIRD, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. To our right trusty and well-beloved Sir *John Holt, Knt.* our chief justice, assigned to hold pleas in our court before us, greeting: Whereas in the statute set forth in the parliament of the lady *Elizabeth*, late queen of England, holden at *Westminster* the twenty-third day of *November* in the 27th year of her reign, it was enacted by the authority of the same parliament, that where any judgment should, at any time thereafter, be given in the court of king's bench in any suit or action of debt, detinue, covenant, account, action upon the case, *ejectione firmæ*, or trespass, first commenced, or to be first commenced there (other than such only where the said queen's majesty should be party), the party, plaintiff or defendant, against whom such judgment should be given, might at his election sue forth out of the court of chancery a special writ of error, to be devised in the said court of chancery, directed to the chief justice of the said court of the king's-bench for the time being, commanding him to cause the said record, and all things concerning the said judgment, to be brought before the justices of the common-bench and the barons of the exchequer into the exchequer chamber, there to be examined by the said justices of the common bench and barons aforesaid; which said justices of the common bench, and such barons of the exchequer as are of the degree of the coif, or six of them at the least, by virtue of that statute should thereupon have full power and authority

to examine all such errors as should be assigned or found in or upon any such judgment, and thereupon to reverse or affirm the said judgment, as the law should require, other than for errors to be assigned or found for or concerning the jurisdiction of the said court of king's bench, or for any want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding whatsoever; and after that the judgment should be affirmed or reversed, the record, and all things concerning the same, should be brought back into the said court of king's bench, that such further proceeding should be had thereupon, as well for execution as otherwise should appertain, as in the said statute, among other things, more fully appears; and forasmuch as in the record and judgment, and also in the giving of judgment in a plaint which was in our court before us by bill, between *Thomas Hartop* and *Richard Holt*, otherwise called *Richard Holt of London*, mercer, as well of a debt of 335l. which the said *Thomas* demanded of the said *Richard*, as of 43s. for his damages which he sustained by occasion of the detaining of that debt, and also in the awarding of execution of the judgment aforesaid, upon our writ of *scire facias* issuing out of our same court for the said *Thomas* against the said *Richard* of the debt and damages aforesaid, manifest error hath intervened, as by the complaint of the said *Richard* we are informed; which said error in no manner concerneth us, or the jurisdiction of our said court of king's bench, or the want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict or proceeding whatsoever, as we are informed; we willing that the said error, if any be, be corrected, according to the form of the statute aforesaid, and full and speedy justice done to the said parties in this behalf, do command you, that if judgment be given, and an award of execution of the same judgment upon our writ of *scire facias* be adjudged, that as well the record and proceedings aforesaid, as all things concerning the same, before the said justices of the common bench and barons of our exchequer aforesaid, in the exchequer chamber aforesaid, on *Saturday*, to wit, the second day of *May* next coming, you cause to be brought before our said justices and barons, that they having examined the record and process aforesaid, may cause farther to be done thereupon that which of right and according to the law and custom of our kingdom of *England* shall be meet to be done. Witness Ourselves at *Westminster* the twelfth day of *February* in the seventh year of our reign.

HARTOP
against
HOLT.

Hartop against Holt.

Case 117.

THE PLAINTIFF had judgment in an action of debt in this court. A writ of error was brought in the exchequer chamber and the judgment affirmed. Afterwards a *scire facias* was brought on a judgment in debt, obtained in the king's bench, and, after judgment affirmed, a *scire facias* to have execution be sued out, a writ of error will not lie in the exchequer chamber upon an award of execution on a judgment on this *scire facias*; for the 27. Eliz. c. 8. intends only a writ of error on the merits of a case.—S. C. 1. Salk. 263. S. C. Comb. 393. S. C. Holt, 271. S. C. 12. Mod. 105. S. C. 1. Ld. Ray. 97. S. C. 3. Ld. Ray. 73. Skin. 590. Comb. 12. 264. S. Mod. 121. 147. 373. Fitzg. 175.

brought

HANTON
against
MOLT.

brought *quare executionem non*, and an award of execution thereupon; then a writ of error was brought *tam in redditione iudicii quam in adjudicatione executionis, &c.* which was allowed by the clerk of the errors; pending which writ, the plaintiff took out execution.

And now a motion was made to set it aside, because it was sued forth when there was a writ of error depending, which is a *superfedeas*.

* [230]

Comb. 19.
Cro. Car. 286.
1. Roll. Rep.
264.
1. Vent. 38.
5. Com. Dig.
"Pleader"
(3. B. 12.)
2. Bac. Abr.
209.
4. Bac. Abr.
420.
Doug. 352.

* The question was, Whether a writ of error would lie in THE EXCHEQUER CHAMBER, upon an award of an execution of a judgment upon a *scire facias* now after an affirmance of the first judgment?

It was admitted, that the statute gives a writ of error upon judgments in seven actions only, of which a *scire facias* is none; but it being for execution of a judgment in an action of debt, it is within the meaning and equity of the act (a), which was to relieve as well against an erroneous execution as an erroneous judgment; for that may be affirmed, and yet the execution reversed (b). This was the opinion of my LORD HALE (c); and the reason by him given was, that a judgment in a *scire facias*, grounded upon one of those actions mentioned in the statute, is in effect a part of the first suit, and they having cognizance of the original action, have also cognizance of all the dependencies. But the plaintiff shall not be judge whether this writ of error be well brought or not; it is *prima facie* a good *superfedeas* to his action, and he must not undertake to determine the validity thereof after it is allowed; therefore he ought not to take out execution without leave of the Court, or without pleading it in abatement, or demurring.

On the contrary it was said, that a *scire facias* is a judicial writ, and the award of execution upon it, is not such a judgment upon which a writ of error will lie in the exchequer chamber; it is not a judgment upon any of the seven causes of action mentioned in the statute, and therefore such a writ of error has been disallowed upon a judgment in *scandalum magnatum* (d), and likewise upon a judgment on the statute of Usury (e), for taking more than six pounds for the loan of one hundred; but it has been allowed upon the statute of Tithes, for that gives an action of debt.

Afterwards, in *Michaelmas Term*, THE COURT gave judgment, viz. The design of the act of parliament (f) was to give a writ of error upon the merits of the case (g); but here the right is

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| (a) Nevil v. South, Cro. Car. 286. | Needham, 1. Sid. 143. Doug. 351. (337) |
| 1. Roll. Abr. 929. | (e) Whittin v. Preston, 1. Sid. 240. |
| (b) Cro. Car. 464. | See Vent. 49. |
| (c) 1. Mod. 79. | (f) 27. Eliz. c. 8. |
| (d) Cro. Car. 142. Strafford v. | (g) Crow v. Maddock, Andr. 287. |
| | determined, |

Trinity Term, 8. Will. 3. In B. R.

determined, and the writ of error is brought upon the award of execution; so that the exchequer chamber have no authority after they have affirmed the first judgment.

Therefore the writ of error is no *superfedeas*.

HARTOP
against
HOLT.

* Johnson against Lee.

* [231]

Case 118.

Hilary Term, 3. Will. & Mary. Roll

BERKSHIRE, } **M**EMORAND. quod alias SCILICET
to wit. } Termino Pasche ult. præterit. coram domino
rege et domina nuper REGINA MARIA apud WEST. venit WIL-
LIELMUS JOHNSON gen. qui tam pro domino rege et dicta domina
nuper regina quam pro seipso in hac parte sequitur per THOMAM
CHADWICKE attorn. suum et protulit. in cur. tunc ibidem quan-
dam billa. suam versus GODFRID LEE gen. in custod. mar. &c. de
placito transgr. et contempt. contra eos qui secut. sunt placitum in cur.
christianitat. post prohibition. regiam eis prius inde in contrar. direct.
et deliberat. et sunt pleg. de prosequen. scilicet. JOHANNES DOE et
RICHARDUS ROE; quæ quidem billa sequit. in hæc verba: ff. BERKS.
ff. WILLIELMUS JOHNSON gen. qui tam pro domino rege et do-
mina regina quam pro seipso sequit. in hac parte querit. de GODFRID.
LEE gen. in custod. mar. Maresc. domini regis et dominæ reginæ
coram ipsis rege et regina existen. de placito transgr. et contempt.
contra eos qui secut. sunt placitum in cur. christianitat. post prohibition.
regiam eis prius inde in contrar. direct. et deliberat. pro eo videlicet quod
cum secund. leg. et consuet. hujus reg. Angliæ omnia et singula pla-
cita et cog. placit. de quibuscunque debet. contract. transgr. super casu
expens. sive feod. infra hoc regn. Angl. continen. sive emergen. cate-
raque hujusmodi placita et negotia et eorum placitorum cognition. ad
dictos dom. regem et dominam reginam nunc et coron. suam regiam
specialit. spectant. et pertinent. ac per communem legem terræ hujus
regni Angliæ et non in cur. christianitat. per leges sive censuras eccl.
ullo modo triari terminari aut discuti debeant et semper hactenus de-
buer. et consuever. cumque etiam per quendam actum in parlamento
dom. HENR. nuper regis Angliæ octavi anno regni sui vicesimo
tertio tent. edit. et provis. inter alia inactitat. fuit autoritate ejusdem
parliamenti quod nulla persona foret citat. summonit. vel alit. vocat.
ad comparen. per seipsum vel seipsos aut per aliquem procurator. co-
ram aliquo ordinario archidiacono commissar. official. aut aliquo al. iudice
spiritual. extra dioces. vel peculiar. jurisdicet. ubi eadem persona quæ
foret sic citat. summonit. vel alit. vocat. foret inhabitans ANGLICE
dwelling tempore adjudication. sive emanation. ejusdem citation. sive
summonition. nisi foret per in vel super certis causis in eodem actu par-
ticularit. except. mentionat. quodque nullus archiepisc. neque episcop.
ordinar. official. commissar. vel aliquis al. substitut. vel ministr. ali-
quorum præd. archiepisc. episc. archidiacon. vel aliorum ten. aliquam
spiritual. jur. ad * aliquod tempus à festo Pasc. præx. sequen. post
edition. actus præd. peterent demandarent caperent vel reciperent de
aliquibus subdit. dict. domini regis aliquam summam vel summas pe-
cuniæ

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JOHNSON
against
LEE.

cunctis pro sigil. action. alicujus citation. post præd. festum adjudicat. vel obtent. quam tant. tres denar. sterlings super pænis et pœnalitat. in eodem actu content. et limitat. prout per eundem actum (relation. inde habet.) plenius liquet et apparet; cumque etiam præd. WILLIELMUS JOHNSON modo sit et per spatium duorum annorum jam ult. elaps. fuit residen. et inhabitans apud paroch. de HUNGERFORD in eodem com. BERKS infra peculiar. jur. decani de SARUM ac infra dioc. s. SARUM, et non est nec infra spatium duorum annorum jam ult. elaps. fuit inhabitans. sive residen. infra civitat. LONDON. vel suburbium ejusdem civitatis neque alibi infra dioc. Cantuar. ac etiam liber homo hujus regni Angliæ jam existit; et sic per totum tempus vite sue extitit ac ratione inde omnibus et singulis libertatibus privileg. et liberis consuetud. hujus regni Angliæ quatenus ligeus domini regis et dominæ reginæ nunc et pregenitorum suorum nuper regum et reginarum hujus regni Angliæ usitat. et approbat. gaudere debeat; præd. tamen GODFRIDUS LEE præmiss. non ignarus sed machinans. ipsum WILLIELMUM JOHNSON contra debet. hujus regni Angliæ formam opprimere et dict. dominum regem et dominam reginam nunc exhereditare ac cognition. placiti quæ ad cur. dict. domini regis et dominæ reginæ nunc pertinet ad aliud examen in cur. christianitat. trahere ipsum WILLIELMUM JOHNSON primo die Septembris anno regni dict. domini regis et dominæ reginæ nunc quinto apud HUNGERFORD in com. BERKS. præd. ac infra peculiar. jur. decani de SARUM ac infra dioc. SARUM citari causavit ad compar. coram venerabili viro GEORGIO OXENDEN leg. d. clare alm. cur. Cantuar. de Arcubus LONDON. official. principal. ejusve surrogat. aut al. iudice spiritual. in ea parte competen. in aula voc. Doctors Commons scituat. infra civitat. LONDON. secundo die Octobr. extunc prox. sequen. Ad quem diem et locum præd. coram præfat. GEORGIO OXENDEN tunc iudice spiritual. (eodem WILL. JOHNSON secundum exigen. citation. præd. compar.) præd. GODFRIDUS LEE adtunc et ibid. coram præfat. iudice spiritual. petiit de eodem WILLIELMO JOHNSON pro feod. et expens. separal. denar. summas in toto se attin. ad quind. libr. quatuor solid. et octo denar. in schedul. libello posthac mentionat. annex. particularit. express. scilicet pro denar. expendit. quinque libr. et octo denar. et pro feod. decem libr. et quatuor solid. caute et subdole versus ipsum WILLIELMUM JOHNSON libellando quod ipse GODFRIDUS LEE fuit et est procurator. cur. consister. episcopi LONDON. ac quod in vacation. post Terminum Sanctæ Trin. ann. D. m. 1683. vel Term. Sanctæ Mich. præx. et immediate sequen. * dictus WILLIELMUS JOHNSON tunc minor existens. annos agen. vigint. et dimid. sed virescens primum ætat. juxta ante tunc temporis non compleverit et eadem causa per se. habilem standi in iudicio ad recuperan. l. gatum per WILLIELMUM JOHNSON ejus avum nuper defunct. sibi reliet. et donat. non habend. quancumque MARGARETAM CHRISTIAN. vid. curatorem sibi ad officium præd. dicto WILLIELMO JOHNSON assign. onus curation. in ea acceptavit; eademque MARGARETA CHRISTIAN et dictus WILLIELMUS JOHNSON vel aliquis al. amicus dicti WILLIELMI JOHNSON consuevit. seu eorum alt. consuevit dictum GODFRID. LEE de prosequen. legitime contra quosdam RICHARDUM PRICE

PRICE et THOMAM BATTALL executor. test. dict. WILLIELMI JOHNSON defunct. ad exhiben. inventor. et reddend. computum de bonis et catallis præd. WILLIELMI JOHNSON defunct. fecer. dictum GODFRIDUM LEE procurator. ad prosequen. causam præd. Item quod dictus GODFRIDUS LEE in vacation. ante Termin. Sancti Michaelis ipso Term. Sancti Michaelis anno Domini 1683 supra dicto citation. contra dict. RICHARDUM PRICE et THOMAM BATTALL executor. test. dicti WILLIELMI JOHNSON defunct. ad exhiben. inventor. et computum bonorum dicti WILLIELMI JOHNSON defunct. et ad responden. dict. WILLIELMO JOHNSON jun. per decret. MARGARETAM CHRISTIAN ejus curatric. assign. in causa subtraction. legat. præd. sub sigillo cur. consistor. episcopali LONDON. misit et in dict. RICHARDUM PRICE personalit. exequi curavit et dict. executor. pro non comparen. juxta tenor. cujusdam decreti viis et modis in dicta cur. consistor. episcopali LONDON. pro contumacion. sua excommunicari procuravit ac quod omnia et singula feod. et ceter. pecunie summ. in eadem schedula specificat. ex consuetud. cur. consistor. episcopi à tempore immemorat. et in præsentis sunt debita et debite solven. advocat. procurator. registeris et al. ministr. dicte cur. prout in eadem schedula continetur; et quod præfat. WILLIELMUS JOHNSON solution. feod. et cæterarum pecun. summarum in dicta schedula mentionat. et express. in se suscepit et promisit solvere præfat. GODFRIDO LEE sed nondum solvit aut satisfecit prout per copiam libelli et scheduli adinde annex. hic in cur. prolata. lect. et audit. plenius liquet et apparet, ac licet ipse præfat. WILLIELMUS JOHNSON ad aliquod tempus infra sex annos ante diem exhibition. querel. sive libelli præfat. GODFRIDO LEE præd. non assumpsit super se ad solven. præfat. GODFRIDO LEE debet. feod. seu expens. in schedula libello præd. annex. mentionat. vel aliquam inde partem licetque præfat. judice spiritual. manifeste per libellum præd. appar. quod præfat. WILLIELMUS JOHNSON fuit infra ætat. viginti et unius annorum ubi scilicet præd. versus præfat. RICHARDUM PRICE et THOMAM BATTALL prosecut. fuit per præd. GODFRIDUM LEE; licetque etiam idem WILLIELMUS JOHNSON omnia et singula * præmissa præd. per ipsum WILLIELMUM JOHNSON super suggest. et allegat. in præd. cur. christianitat. coram præfat. judice spiritual. in exoneration. suam et dimission. ibid. in præmiss. sæpius placitavit allegavit et il. inevitabili test mon. et veritat. probare obtulit, idem tamen judex spiritual. placitum allegation. et probat. il. admittere seu recipere penitus recusavit et præd. GODFRIDUS LEE ipsum WILLIELMUM JOHNSON per definitivam dict. cur. christianitat. senten. de et super præmissis præd. condemnare ac ipsum WILLIELMUM JOHNSON ad solven. eidem GODFRIDO LEE omnia et singula feod. et expens. in schedula libello præd. annex. mentionat. compellere tot. suis viribus conatur et indies machinatur in dict. domini regis et domine regine nunc contempt. et in ipsius WILLIELMI JOHNSON grave damnum præjudicium gravamen et depauperation. manifest. ac contra form. statuti præd. ac licet breve dict. domini regis et domine regine nunc de prohibition. præfat. GODFRIDO LEE in hac parte decimo die Martii anno regni dicti domini regis et domine regine nunc sexto apud

HUNGERFORD

JOHNSON
aguing
LEE.

HUNGERFORD præd. in com. præd. in contrarium inde direct. et deliberat. fuit idem tamen GODFRIDUS LEE placitum præd. post prohibitionem. regiam prius ei in contrar. inde in forma præd. deliberat. postea scilicet decimo quarto Martii anno sexti supradicti apud HUNGERFORD præd. in com. BERKS præd. ult. prosecut. et in placito il. processit dict. brevi dict. domini regis et domine regine nunc de prohibitionem. in forma præd. direct. in contrar. inde quovis modo non obstante in dict. domini regis et domine regine nunc contempt. et ipsius WILLIELMI JOHNSON damnum præjudic. depauperation. et gravamen manifestum, unde dicit quod deteriorat. est et damnum habet ad valen. quadraginta librarum, et inde tam pro dom. rege et domina regina quam pro seipso in hac parte producit scilicet, &c.

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Et modo ad hunc diem scilicet diem Mercurii prox. post Oñob. Sancti Hillar. isto eodem Term. usque quem diem præd. GODFRIDUS LEE habuit licen. ad billam præd. interloquen. et tunc ad responden. &c. Ante quem diem præd. nuper domina regina MARIA diem suum clausit extremum coram dom. rege apud WESTM. ven. tam prædictus WILLIELMUS per attorn. suum præd. quam præd. GODFRIDUS per JOHANNEM LEE attorn. suum, et idem GODFRIDUS defen. vim et injur. quando, &c. et omnem contempt. et quicquid, &c. et dicit quod ipse non secut. est placitum in præd. cur. christianitat. post prohibitionem. regiam ei in contrar. inde direct. et deliberat. modo et forma prout prædictus WILLIELMUS JOHNSON qui tam, &c. superius versus eum queritur, et de hoc pon. se super patriam. et præd. WILLIELMUS JOHNSON qui tam, &c. inde similiter, &c. Sed per breve dict. domini regis de consultation. in hac parte impetran. idem GODFRIDUS protestan. * quod præd. WILLIELMUS JOHNSON in ead. cur. christianitat. superius mentionat. non placitavit seu allegavit quod ipse idem WILLIELMUS ad aliquod tempus infra sex annos ante diem exhibition. querel. sive libelli ipsius GODFRIDI præd. non assumpsit super se ad solven. eidem GODFRIDO debitis. feod. seu capens. in schedul. libello præd. annex. mentionat. vel aliquam inde parcel. prout præd. WILLIELMUS JOHNSON superius allegavit, pro placito idem GODFRIDUS dicit quod in eodem actu in nar. præd. WILLIELMI JOHNSON mentionat. inactitat. fuit quod nulla persona foret citat. summonit. vel alit. vocat. ad comparen. per seipsum vel seipsam aut per aliquem procurator. coram aliquo ordinari. archidiacono commissor. aut aliquo al. iudice spiritual. extra dioces. vel peculian. jur. ubi eadem persona quæ foret citat. summonit. vel alit. vocat. foret inhabitant. ANGLICE dwelling, tempore adjudication. sive emanation. ejusdem citation. sive summonition. sub pœnis et pœnalitat. in eodem actu mentionat. except. foret in casu. quod aliquis episcop. aut aliquis iudex inferior habens sub ipsum jurisdiction. in suo jure et titulo vel per commission. requisition. vel instan. faceret archiepiscopo episcopo vel alicui superiori ordinario ad capien. tract. ANGLICE treat, examinan. vel determinan. materiam coram ipso vel ejus substitut. et id solummodo facien. in casibus ubi lex civilis vel canonicalis affirmat execution. tal. requisition. vel instan. jurisdiction. legal. seu tolerabil. esse et except. in quibusdam al. casibus in eodem actu specificat. prout in eodem actu plenius continetur. Et idem GODFRIDUS ulterius dicit quod ipse per spatium
vigi

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viginti et quatuor annorum et amplius jam ult. elapsi. fuit et adhuc est unus procurator cur. consistor. episcopi LONDON. quodque ipse idem GODFRIDUS vicesimo septimo de Octobris anno Domini 1683 apud LONDON. in paroch. SANCTI BENEDICTI prope RIPAM PAULAN. in warda de CASTLE BAYNARD relict. fuit fore procuratorem ipsorum MARGARETÆ et WILLIELMI in eadem cur. consistor. in causa infra mentionat. et tunc et ibidem ad instan. et requisition. præd. MARGARETÆ et WILLIELMI JOHNSON citation. contra dict. RICHARDUM PRICE et THOMAM BATTALL execut. test. præfat. WILLIELMI JOHNSON defunct. avi dict. WILLIELMI qui tam, &c. ad exhiben. inventorium et computum bonorum præfat. WILLIELMI JOHNSON defunct. et ad responden. dicto WILLIELMO JOHNSON modo quer. per dict. MARGARETAM ejus curatricem per eandem cur. assign. in causa subtraction. legat. præd. per præd. WILLIELMUM JOHNSON defunct. ei donat. sub sigillo cur. consistor. episcop. LONDON. debito modo prosecut. fuit et eandem citation. in dictum RICHARDUM PRICE personalit. exequi causavit et dict. executor. pro contumacia sua in non comparend. juxta tenor. ejusdem per debitum legis cursum excommunicari procuravit *, quodque omnia et singula feod. et denar. summe in schedula præd. specificat. jussu eidem GODFRIDO devenere. pro feod. et expens. suis in lite sive facta præd. Et quia præd. WILLIELMUS JOHNSON modo quer. et præd. MARGARETA licet sæpius requisit. feod. et expens. præd. eidem GODFRIDO solide recusaver. præd. GODFRIDUS eundem WILLIELMUM JOHNSON modo quer. pro recuperation. denar. in præd. schedula specificat. in cur. peculiar. jurisdiction. decan. SARUM sectans intendebat et comabatur. Sed ROBERTUS WOODWARD legum doctor decan. ecclesie cathedral. SARUM judex cur. peculiar. jurisdiction. præd. habens jur. ibid. in jure suo per quoddam scriptum suum sigillo suo sigillati quem idem GODFRIDUS hic in cur. profert geren. dat. vicesimo quinto die Februar. anno Domini 1692. requisivit venerabil. præd. GEORGIUM OXENDEN legem doctor. et almæ cur. Cantuar. judicem vocan. eundem WILLIELMUM JOHNSON per nomen WILLIELMI JOHNSON de HUNGERFORD in com. BERKS infra peculiar. jur. dict. decani coram ipso eodem GEORGIO OXENDEN vel aliquo al. competen. judice dict. cur. ad responden. dicto GODFRIDO LEE in causa et subtraction. feod. et quod causa præd. audit. et determinat. in eadem cur. secundum legem et justitiam prout per scriptum præd. plenius liquet et apparet. Et idem GODFRIDUS ulterius dicit quod lex civilis vel canonical. affirmat execution. tal. requisition. vel instan. jur. legal. vel tolerabil. esse: super quo idem GODFRIDUS præd. WILLIELMUM JOHNSON citari causavit ad comparen. coram præfat. GEORGIO OXENDEN legum doctore almæ cur. Cantuar. de arcubus LONDON. official. principal. ejusve surrogat. aut al. judice competen. in aula VOCAT. Doctors Commons scituat. infra civit. LONDON. secundo die Octobris jam ult. elapsi. et in eadem cur. ante prohibition. præd. eidem GODFRIDO deliberat. præd. WILLIELMUM modo quer. pro feod. et expens. præd. traxit in placitum prout ei bene licuit feod. et expens. il. tunc et adhuc eidem GODFRIDO debet. et insoluit. existen. quæ est eadem prosecutio et in placitum tractio unde idem WILLIELMUS

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WILLELMUS JOHNSON superius queritur. Et hoc paratus est verificare; inde pet. iudicium et breve domini regis de consultation. sibi concedi, &c.

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Et præd. WILLIELMUS JOHNSON qui tam, &c. dicit quod per aliqua per præd. GODFRIDUM LEE superius placitando allegat. breve dicti domini regis de consultation. eidem GODFRIDO LEE in hac parte concedi minime debet, quia protestando quod præfat. GODFRIDUS LEE non retent. fuit fore procurator. præd. MARGARETA et WILLIELMI JOHNSON ad prosequen. præd. THOMAM PRICE et THOMAM BATTALL prout præd. GODFRIDUS superius inde placitando allegavit; protestandoque etiam quod lex civilis vel canonical. non * præfat. GEORGIO OXENDEN fact. ad tenen. placitum præd. in placito præfat. GODFRIDI mentionat. fore legal. vel tolerabil. pro placito tamen idem WILLIELMUS JOHNSON dicit quod placit. per præd. GODFRIDUM LEE quoad requisition. præd. ROBERTI WOODWARD decani eccl. cathedr. SARUM præd. GEORGIO OXENDEN fact. ad vocan. præfat. WILLIELMUM JOHNSON coram ipso præfat. GEORGIO OXENDEN vel al. iudice competen. dict. cur. Cantuar. ad responden. dicto GODFRIDO in causa præd. pro subtraction. feod. et quod causa illa determinat. fuit modo et forma præd. superius placitat. materiaque in eodem content. minus sufficien. in lege existunt ad ipsum GODFRIDUM ad breve dicti domini regis de consultation. in ea parte impetran. ad quod idem WILLIELMUS necessari non habet nec per legem terræ tenetur aliquo modo respondere. Et hoc parat. est verificare; unde pro defect. sufficien. respons. in hac parte idem WILLIELMUS JOHNSON pet. iudicium et damna sua præd. occasione præd. sibi adjudicari, &c. Et præd. GODFRIDUS dicit quod placitum præd. per præd. GODFRIDUM quoad requisition. præd. ROBERTI WOODWARD præd. decani præd. eccl. cathedral. SARUM præd. GEORGIO OXENDEN fact. ad vocan. præfat. WILLIELMUM JOHNSON coram ipso præfat. GEORGIO OXENDEN vel al. iudice competen. dict. cur. Cantuar. ad responden. eidem GODFRIDO in causa præd. pro subtraction. feod. præd. et quod causa illa determinat. in eadem cur. Cantuar. determinat. fuit modo et forma præd. superius placitat. materiaque in eodem content. bon. et sufficien. in lege existunt ad ipsum GODFRIDUM ad breve dicti domini regis de consultation. in hac parte impetran. Quod quidem placitum materiamque in eodem content. idem GODFRIDUS parat. est verificare et probare prout cur. &c. Et quia præd. WILLIELMUS JOHNSON ad placitum il. non respon. nec il. hucusque aliquant. dedit idem GODFRIDUS ut prius pet. iudicium et breve dicti domini regis de consultation. in hac parte sibi concedi, &c.

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Et quia cur. dicti domini regis nunc hic de iudicio suo de et super præmissis reddend. nondum advisatur dies inde dat. est partibus præd. coram domino rege apud WEST. usque diem prox. post de iudicio suo de et super præmissis il. audien. eo quod cur. dicti domini regis nunc hic inde nondum, &c.

John-

• Johnson against Lee.

Case 119.

PROHIBITION. The plaintiff declared, that by the statute 23. Hen. 8. c. 9. it is enacted, "that no person shall be cited to appear out of his diocese where he dwelleth;" that the plaintiff was resident at *Hungerford* in *Berks*, in the diocese of *Salisbury*; that the defendant caused him to be cited before the DEAN OF THE ARCHES in *London*, and libelled against him for expences and fees in the consistory court of the Bishop of *London*, and averred that such fees were justly due according to the custom of the said court, and that he promised to pay them; and although he made no such promise within six years, yet the Court proceeded to give sentence against him; and the defendant prosecuted his plea after the writ of prohibition delivered to him, &c.

Pleadings in prohibition.
S. C. Skin. 589.
S. C. Holt, 656.
596.
S. C. Comy. 18.
2. Lev. 35. 90.
173.
Comb. 105.
1. Salk. 40.
Carth. 33. 476.
1. Lev. 193.
2. Salk. 548.
1. Saund. 402.
12. Mod. 608.
1. Ray. 703.
1. Vent. 165.
Bunb. 170.
4. Bac. Abr. 256.

The defendant for consultation pleads the very same statute; by which it is enacted, "that no person shall be cited or summoned, or otherwise called to appear by himself or herself, or by any PROCTOR, before any ordinary, archdeacon, commissary, official, or any other spiritual judge, out of the diocese, or peculiar jurisdiction, where the person which shall be cited, summoned, or otherwise called, shall be inhabiting and dwelling at the time of the awarding the same citation or summons: EXCEPT" (amongst many other causes in the said act mentioned) "that any bishop, or any other inferior judge, having under him jurisdiction in his own right and title, or by commission, make request or instance to the archbishop, or other superior ordinary or judge, to take, treat, examine, or determine the matter before him or his substitute; and that to be done in cases only where the civil law or common law doth affirm execution of such request or instance of jurisdiction to be lawful or tolerable."

THAT the defendant is a proctor in THE CONSISTORY COURT of the Bishop of *London*, and was retained as such by the curatrix of the plaintiff (he being then under age), to prosecute a suit, against the executors of his grandfather, for a legacy given to the plaintiff, and to exhibit an inventory; that they were excommunicated for contumacy in not appearing; and that the fees and expences in the libel were justly due to him for prosecuting the said suit; that he endeavoured to sue the said plaintiff for the recovery of the said fees in THE COURT OF PECULIARS of the Dean of *Salisbury*; but he being judge of the court, and having jurisdiction in his own right, did, by a writing under his seal, require the Dean of the Arches to call the plaintiff before him, to answer the defendant in a cause for subtraction of fees; which cause was there determined accordingly: and the defendant avers, that the civil and common law affirms the execution of such request to be lawful. Whereupon the defendant, before the prohibition delivered to him, did cite the said Johnson to appear before the said judge of THE ARCHES in the cause aforesaid; and avers it to be the same prosecution of which the plaintiff complained.

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To this plea the plaintiff demurred, and the defendant joined in demurrer.

It was argued, that no consultation ought to go.

If a peculiar jurisdiction belongs to the archbishop, a cause transmitted immediately from such peculiar to the archbishop, omitting the bishop, is within the exception 23. Hen. 8. c. 9.

S. C. Skin. 589.
1. Sid. 90.
1. Lev. 225.
1. Brownl. 46.
6. Com. Dig.
"Prohibition"
(F. 9.).
1. Bac. Abr.
617.

For, FIRST, if the defendant will bring himself out of the statute, he must shew, that the request made by the inferior ordinary was made to him who had the next superior jurisdiction; which he has not done (a): for here the request is from the *Dean of Salisbury*, who was judge of THE PECULIAR, to the *Dean of the Arches*, when it ought to have been to the *Bishop of Salisbury*, being the next immediate ordinary, unless it appear that A PECULIAR is such a jurisdiction from which there is no appeal to the ordinary; or that it is a jurisdiction by prescription (b). The judge of this PECULIAR is an inferior person to the bishop, and THE PECULIAR itself may be subordinate to him; if so, he cannot transmit a cause *per saltum* to the archbishop, but must leave it to the ordinary, from whom his power is derived (c).

E contra. On the other side it was argued,—FIRST, That the letter of request was to the next immediate ordinary; and if it had appeared that this jurisdiction had been subordinate to him, it would have altered the case; but the plaintiff having alledged that it is a peculiar jurisdiction, the letter of request may be properly made from such to the archbishop himself:—SECONDLY, That if it had been free from a general exemption from all ordinary jurisdiction, which was common, as my LORD HOBART tells us, in MONASTERIES before the dissolution, then the cause must be remitted to the king; for this act was made as well for the preservation of the jurisdiction of THE ORDINARY as for the care of THE PEOPLE: for otherwise the archbishop may call a cause to him, which is in none of the cases within the power given him by this act, and then it will be totally eluded:—THIRDLY, That it is not enough for the plaintiff to say that he lived in the parish of *Hungerford*, within a peculiar jurisdiction of the dean of *Salisbury*, *ac infra diocesis SARUM*, but he ought to shew that the peculiar was subordinate to the *Bishop of Salisbury*, being to deprive the spiritual court of a jurisdiction which they had before the making of this act (d).

A libel in the disjunctive.

SECONDLY, The defendant does not say that this was a case which was permitted by their law, but only that the civil or canon law affirms such request, which is in the disjunctive, and very uncertain.

Libel larger than the request.

THIRDLY, He alledged that the *Dean of Salisbury* requested the *Dean of the Arches* to call the plaintiff before him, to answer in

(a) 1. Salk. 49, 41.

(b) *Gastrel v. Jones*, 2. Roll. Rep. 246. 448.

(c) *Jones v. Jones*, 1. Sid. 90. Cro.

Car. 262.—See also *Hob. 16. 186.*

(d) See the opinion of HOLT, Chief Justice, on this point of the case, Skin. 589.

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a cause for subtraction of fees; and the libel is for subtraction of fees and expences, which is larger than the request, and therefore not good.

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As to the objection, that the *libel* is larger than the request, one being for fees AND expences, and the other being to answer in a cause for subtraction of fees only; it was argued, that this is not material, because such fees must be intended as paid to others, as well as for such as were due to the plaintiff.

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FOURTHLY, But the principal point was, Whether the defendant ought to sue for fees in the ecclesiastical courts, since such things are properly cognizable at common law, for which he might bring a *quantum meruit* or an *indebitatus assumpsit*, upon the retainer for work and labour, and for money laid out; and the law raises the promise. There is no difference between fees in the prerogative court and other courts of equity, for which suits are usually brought in this court; the usage of which courts may be given in evidence at the trial; and especially in this case, which is grounded upon a prescription for customary fees due time out of mind, which shall be tried by a jury. If it be objected, that proctors fees are part of the cause, this cannot be, because when the suit is determined, it cannot be afterwards continued for the fees; and some of the fees in that court are settled by act of parliament, which are those relating to wills. Neither can it be objected, that because this Court will not grant a *mandamus* to restore a proctor when removed from his office (a), therefore you will not grant a *prohibition* when he sues for a recompence for his labour and pains. The law of England takes notice of such suits. But this Court will not take notice whether the party is a proctor or not, but will leave the determination thereof to a proper court. It is true, there is no precedent of any suits here for proctors fees; and it is as true, there are likewise no precedents of such suits for fees in chancery. But they may be well commenced under the general terms for work and labour, and are grounded upon a custom and contract, which are things triable at common law. It is true, a prohibition to the court-christian has been denied by this Court (b), where the libel was for proctors fees; but it was not for that reason alone, for the cause alledged for prohibition was, that the suit for which the fees were laid out was not determinable in that court. But the Judges thought it reasonable not to prohibit the proctor to sue there, for he is only a servant, and is not to take upon him to determine whether that court had any jurisdiction or not of the cause. In the case of *Horton v. Wilson* (c) a prohibition was likewise denied to the spiritual court, where the suit was for proctors fees; but there were but three Judges in the common pleas when that rule was given; the Chief Justice was against the prohibition, and the puisne Judge for it; for he was of opinion, that such fees ought not to be de-

A PROCTOR retained by the curator of an infant to prosecute a suit for a legacy due to the infant, cannot libel in the spiritual court for his expences and fees, but must bring an action for them in the courts of common law.

1. Salk. 333.
- Comb. 337.
- Carth. 276.
1. Mod. 167.
- Skin. 589.
4. Mod. 254.
- Burb. 170.
- Str. 1108.
- Dougl. 629.
- (607.)
6. Com. Dig.
- "Prohibition"
- (F. 5.)
2. Bac. Abr.
- 468.
- Comb. 337.
- Carth. 276.
- Carth. 169.
- Cases in Law and Equity,
- 264.

(a) 3. Lev. 309. 3. Mod. 332.

(c) Michaelmas Term, 25. Car. 2. in the common pleas, 1. Mod. 167.

1. Show. 217. 251. 261.

(b) Roll. Rep. 59.

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manded in the spiritual court, because the plaintiff has a remedy at law, for the retainer implies a contract for which an action on the case will * lie. WYNDHAM, *Justice*, who was the third Judge, was not clear of opinion on either side. But even in that case the Court held, that the proctor having, amongst other things, demanded a customary fee of fourpence for every instrument which was read in the cause, that the law ought to determine, whether such a fee was customary or not. And why not in this case, where the defendant has prescribed for certain fees time out of mind?

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2. Lev. 64.
Skin. 493.
Cases in Law
and Equity, 12.
64. 386. 439.
3. Vent. 274.

E contra it was argued, that this suit is within the cognizance of THE ECCLESIASTICAL COURT, of which a proctor is an immediate officer; and fees are * incident to suits commenced there; and they having cognizance of the subject-matter for which such fees were expended, the determination thereof is also incident to the original cause: they have power over him, and the fees demanded by him, and may lessen and abridge them as they see occasion; and by the same reason that they may prohibit the payment thereof, by the same reason they may order the payment. If the proctor had petitioned the Court, and not proceeded by way of libel for his fees, in such case a prohibition would not lie (a); so that there can be no inconvenience in allowing this jurisdiction, for they are the proper judges of what business is done in their courts, and can call for vouchers better than a jury can do. Their fees are established by the canon law, and are lessened and restrained by the power and authority of the court. Rules are made here to oblige the attornies in matters of practice; and the like rules are made there to oblige the proctors and ministers of the court; so that they must be allowed to be the proper judges in this matter. Matrimony and things testamentary were at first the whole business of that court (b); but now in cases where they have original jurisdiction, they do retain suits even for such matters which may be tried at law; as a libel may be there for not repairing a way leading to a church (c). This case may be compared to that where a prohibition was prayed to the court of admiralty, because instead of stipulation (d) (which is a recognizance in their law as much as bail is here) they had taken a recognizance at common law, wherein the principal and sureties, and their heirs, goods, and lands, were bound; whereas the libel ought to be against the ship and goods, and execution against the latter, and not against the party: but the civilians argued, that execution might be taken of the body, though not of the lands; and that this was not in the nature of a recognizance, but a stipulation in nature of bail, and might be sued as well in the court of admiralty as at common law; and no prohibition was granted, but the matter was adjourned. The case in the *Modern Reports* (e) is an

Though *Serjeant Harris* argued, that a recognizance taken there to stand to the order of the Court was void.
Noy, 24.

(a) March, 45.
(b) Moor, 25. pl. 2. Justices Reg.
53.

(c)
(d) Greenway v. Baker, Godb. 260.
(e) 1. Mod. 167.

express

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express authority to rule this, where a prohibition was denied for a suit for proctors fees, and there is no book against it. The reason of the law is for the plaintiff; for he being a proctor, is not a temporal officer, and what he has done is about an ecclesiastical suit, and therefore that court must judge of it. A prohibition has been denied in the common pleas for registering fees in a cause between *Gesslin v. Frogart*, 1. Salk. 330. (a).

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SIXTHLY, They ought to allow the plea of *non assumpsit infra sex annos*, for the statute of Limitations extends as well to that court as to courts of equity (b).

2a. Whether the statute of Limitations extends to the spiritual courts.

* *E contra*. The statute of Limitations does not extend to this case; for it is not properly a debt, because expences and fees are of the same nature with the subject-matter for which they were demanded. It may as well be alledged, that defamatory causes are within the statute; so that the ecclesiastical court having original jurisdiction of this matter, no prohibition ought to go.

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Adjournatur (c).

(a) HOLT, *Chief Justice*, upon this point of the case, said, that if the king creates a new office, he cannot annex a fee to it, and *à fortiori* it cannot be done by the canon law; that PROCTORS therefore, at the original institution of their office, could have no other remedy than a *quantum meruit* for their labour and pains, and that the sums thus fixed by juries at common law came to be taken as *assessable fees* in the spiritual court; but that this could not alter the nature of a proctor's service, which is temporal; for it is formed on a contract and retainer, which is a temporal act: and ROXBURY, *Justice*, relying on the case of *Goslin v. Ellison*, seemed to be of the same opinion,

S. C. Skin, 90.; and it is said in Gibson's Codex, 1015. that after several motions a prohibition was granted.—See also *Johnston v. Oxenden*, 4. Mod. 255. where a suit in the spiritual court for proctors fees was stayed; and *Pollard v. Gerard*, 1. Ld. Ray. 703. that the register of a spiritual court cannot sue there for his fees; neither can an apparitor or a parish clerk sue in the spiritual court for their fees, *Pitts v. Evans*, 2. Stra. 1108. 13. Viner, 155. *Pearson v. Campion*, Dougl. 629.

(b) *Berkley v. Morrice*, Hard. 502.

(c) It is said, that after several motions a prohibition was granted, *Gibson Cod.* 1015.

Harris against Pett.

Case 120.

Easter Term, 8. Will. 3. Roll 173.

DEBT UPON A BOND. The condition thereof was, "to free and keep harmless the plaintiff of and from all costs and damages which may arise by reason of a law-suit, &c."

To debt on a bond conditioned "to save the plaintiff harmless of and from all costs and damages which may arise by

The defendant pleaded "*non damnificatus*" generally, and the plaintiff demurred to the plea.

The question was, Whether such plea was good or not?

"reason of a certain suit at law," the defendant may plead "*non damnificatus*" generally.—S. C. Carth. 374. Savil, 90. Cro. Jac. 360. 2. Bulst. 267. Cro. Eliz. 253. 1. Sid. 444. Show. 1. 1. Mod. 43. 2. Saund. 83. 3. Mod. 252. 2. Wils. 5. 11. 126. Cowp. 47. 578. 4. Bac. Abr. 94.

HARRIS
against
PETT.

It was agreed, that if the condition had been to *keep harmless* only, then "*non damnificatus*" had been a good plea; but it being to *free* and *keep harmless*, he ought to shew how he had *freed* him, and not answered the damnification alone: and to prove this the case of *Brett v. Andrews* (a) was cited, which was, Debt upon bond for performance of an award; in which, amongst other things, it was awarded, that the defendant should acquit, discharge, and save harmless the plaintiff of such a bond; and the like plea was pleaded as in this case; which was held insufficient, because the defendant ought to shew how he had discharged him. If the award had been made, reciting a suit in chancery between the parties, and that the suit should cease, and the plaintiff *staret acquietatus pro quâlibet materiâ in præd. billâ*, there a plea *quod stetit quietus* *inde* is good enough, without shewing how, because he is acquitted by the award itself, viz. *staret acquietatus*. But if a man had been obliged to acquit another from a debt or suit, it is not sufficient to plead "*non damnificatus*" generally, but he ought to shew how and in what manner; and this was the case of *Freeman v. Sleen* (b).

To which it was answered, that the case of *Brett v. Andrews* (c) differs from that at bar, because it was to acquit the plaintiff from a peculiar obligation; which word "acquit" implies, that it must be by deed, and therefore he ought to shew by what
* [244] deed. * But this condition was not to *free* and *acquit* the plaintiff from a suit, but to *indemnify* him from the consequences of it, which are costs and charges; and the defendant has pleaded, that no damage happened to him, so that it lies upon him to prove that he was damnified. An action on the case (d) was brought against the defendant, who promised, that in consideration the plaintiff would discharge a third person then under an arrest, that he would pay the money, and alledged in fact that he *exoneravit*; the plaintiff had judgment in the common pleas; and upon a writ of error in this court, one of the errors assigned was, that "*exoneravit eum*" was not good, without shewing how; but the Court held it well enough, and that it need not be as a discharge of a bond, or a rent, which ought to be shewed in what manner. If this had been pleaded in the affirmative, "that he had freed and acquitted the plaintiff," there he must shew how (e). But it being in the negative, the plaintiff ought to shew how he was damnified (f).

And of this opinion was THE COURT, that it was a good plea, because the condition was to save the plaintiff harmless from something that was uncertain at the time of the making thereof, viz. from the costs and charges of the suit, that no costs might be recovered against him; but if it had been to save harmless from a

(a) 1. Leon. 71. Owen, 7.

(b) Cro. Jac. 339. 1. Roll. Abr. 432. pl. 2.

(c) 1. Leon. 71. Owen, 7.

(d) King v. Hobbs, Cro. Eliz. 913.

(e) Mauser's Case, 2. Co. 4.

(f) Cro. Jac. 363, 634. 2. Saund. 84. Co. Ent. 139.

particular thing, there such a negative plea generally would not have done, because the defendant ought to shew how he indemnified the other.

HARRIS
against
PETT.

Whereupon the Counsel, perceiving the opinion of the Court, moved to have leave to *discontinue* the action.

* [245]

Loveday against Winter.

Case 121.

TRESPASS AND EJECTMENT. The jury found a special verdict, the substance whereof was as follows :

If a manor and other hereditaments be settled with a power to the tenant for life to make leases " in possession or in reversion, for one, two, or three lives, or for thirty years, or any other number of years determinable on one, two, or three lives, so as such demise be out of the ancient demesne lands parcel of the premises, or any other lands used therewith for seven years previous to the settlement, so as the ancient rent be reserved," AN

George Pawlet was seised in fee of the manor of *M.* whereof the lands in question, being copyhold, were parcel. Upon the marriage of *Edward* his eldest son, he settled the manor and lands, &c. upon trustees and their heirs, to the use of himself for life, and after his decease to the use of his wife for life; then to *Edward Pawlet*, and the heirs of his body lawfully to be begotten; remainder to his own right heirs. * **PROVISO**, " That it shall be lawful to and for the said *George Pawlet* and *Elizabeth* his wife, by deed indented, to make leases in possession for one, two, or three lives, or for thirty years, to commence after one, two, or three lives, or for any other term, determinable upon one, two, or three lives, or in reversion for one, two, or three lives, or for thirty years, or for any other number of years, determinable upon one, two, or three lives, so as such demise be not made of the ancient demesne lands parcel of the said manor, or of any other lands used therewith for the space of seven years, and so as the ancient rent be reserved." *George Pawlet* by deed indented, reciting that the lands were copyhold, made a lease thereof to one *Robert Blanchlow* for thirty years. The lessor of the plaintiff claims as heir in tail to *George Pawlet* his father.

The question was upon this **PROVISO** in the marriage-settlement, Whether this was a good lease, or not ?

THOSE WHO ARGUED in the negative insisted, that it was not warranted by the power, either as to the land itself, or as to the term.

ABSOLUTE LEASE for thirty years of lands then in lease for the term of two lives, to commence after the said two lives then in being, is in this respect

FIRST, As to the tenure of the land, which is expressly found to be copyhold, it could never be intended that he should make any new estate of copyhold lands; for the estates he was to make are to be by deed indented; and copyhold cannot be let by such deed, so it is not within the power; and the acceptance of a lease of the same lands by a copyholder is a determination of his copyhold

a good execution of the power: but a lease of copyhold lands parcel of the manor is not warranted by this power; for all copyhold lands being ancient demesne, they are excepted, as being " ancient demesne lands parcel of the manor." The rents and services, however, may be demised within the power.—S. C. post. 378. S. C. 2. Salk. 537. S. C. Comb. 371. S. C. Carth. 427. S. C. 12. Mod. 147. S. C. Holt, 414. S. C. 1. Ld. Ray. 267. S. C. 1. Freem. 507. S. C. Comy. 37. Vide 6. Mod. 26. Poph. 8. Moor, 494. 6. Co. 33. 8. Co. 70. 3. Bac. Abr. 418. Powell on Powers, 398. 405. 407. 423. Cowp. 266. 651. 714. 1. Term Rep. 705. 6. Co. 37. Comb. 371. 387. Cro. Jac. 76. Moor, 759. Skin. 296. Co. Lit. 58. Post. 379.

LOVEDAY
against
WINTER.

estate (a). The exception is of "all ancient demesne lands parcel of the manor," which are sufficient words to exempt these lands out of the power of leasing; for a manor consists of *demesnes* and *services*, and these are not only found to be copyhold, but parcel of the *demesnes*.

* [246]

SECONDLY, But if the lands in question had been comprehended under the general words, yet the lease made by *George Pawlet* is void, by reason of the term demised; for it is expressly against the power reserved, which ought to be taken strictly against the lessor. • And therefore where a manor is in lease, and he who has the reversion in fee levied a fine to the use of himself for life, then to his eldest son in tail, but reserved a power for him to make leases for twenty-one years, who made a lease before that in being expired, to begin after the determination thereof; it was adjudged void (b), for it ought to be a lease in possession, and not an interest to begin *in futuro*.

To which it was answered,

FIRST, That as to the objection, that THE PROVISIO did not give *George Pawlet* any power to make leases of *copyhold lands*, because they are parcel of the *demesnes* of the manor; for nothing but the capital house, and the lands therewith occupied, are properly the *demesnes* of a manor; but in the simple acceptance of the word no person has any true *demesnes*, because all land depends on THE CROWN; that is the reason why in pleading it is usually said, that such a person was seised in his *demesnes as of fee* (c). A manor consists of *demesnes* and *services*, and nothing else. Now if the *demesnes* cannot be let, then the power given by this PROVISIO signifies nothing, for *services* are not *lands*, and therefore nothing can be leased; and these powers are not to be construed according to strictness of law, but as words used by lawyers to signify their meaning. For which reason these words, "so as the demise be not made of the ancient demesne lands of the manor," must be taken according to the common acceptance thereof; that is to say, a lease shall not be made of any lands usually occupied with the capital messuage.

SECONDLY, As to the term demised, which, as has been objected, ought not to have been for thirty years absolute, but determinable upon one, two, or three lives.

6. Co. 65:
Skin. 192.

CURIA. Copyholds in strictness are part of the *demesnes* of the manor, because the tenancy being at the will of the lord, the lands are supposed to be always in his hands; but in vulgar acceptance it is otherwise. Now the lands which were in lease for lives are

(a) Lane's Case, 2. Co. 16. 4. Co. 1. Brownl. 148. 6. Co. 33. a.
24. S. C. 70. b. Cro. Eliz. 5.
(b) Shecomb v. Hawkins, Cro. Jac. (c) See Termes de la Ley, "De-
318. S. C. Yelv. 222. S. C. "mesnes," 114.

not

Trinity Term, 8. Will. 3. In B. R.,

not parcel of the manor during the continuance of the lease, but the reversion thereof is parcel.

LOVEDAY
against
WINTER.

Adjournatur (a).

(a) In Michaelmas Term 9. Will. 3. judgment was given for the plaintiff, *HOLT, Chief Justice, TURTON and EYRE, Justices*, holding, that the term was within the power, but that the power did not warrant a lease of copyhold lands held of the manor; and *TURTON and EYRE* thought, that the power was intended to operate on the other lands

which were mentioned in the conveyance; but *HOLT, Chief Justice*, thought, that the rents and services might be demised within the power, for that it appeared to be the intent of the settlement that part of the manor might be demised. S. C. post. 378. S. C. Comy. Rep. 37. S. C. Ld. Ray. 270. S. C. Powell on Powers, 398.

* [247]

* Petit against Smith.

Cafe 122.

THE TESTATOR by his last will appointed two executors, and gave each of them a legacy of five pounds, and did not dispose of the residue of his estate. The will was proved in common form.

The spiritual court cannot compel an executor to make distribution of the residuary part of the testator's effects.

The daughter of the testator sued in THE SPIRITUAL COURT for a distribution; for that the executors ought to have nothing by virtue of their executorship, because they had express legacies devised to them by the will, which shews that the testator intended them no more. Whereupon the Court compelled them to exhibit an inventory (a) of the personal estate in order to make a distribution.

S. C. Comb. 378.
S. C. 2. Eq. Abr. 5. 434.
S. C. Comy. 3.
S. C. 1. Peer. Wms. 7.
S. C. 1. Ld. Ray. 86.
Fitzg. 126.
1. Stra. 568.
2. Peer. Wms.

And now they moved for a prohibition, suggesting that THE ECCLESIASTICAL COURT had not such a power but only in cases where the parties die intestate.

And therefore a prohibition was granted nisi causa, &c. (b).

153. 162. 3. Will. 40. 2. Vern. 676. 425. 1. Vern. 473. Prec. Ch. 81. 3. Peer. Wms. 194. 1. Peer. Wms. 544. 3. Atk. 230. 1. Bro. C. C. 154. 328. 1. Bac. Abr. 619, 620. 2. Bac. Abr. 398, 399. 4. Bac. Abr. 248.

(a) By 21. Hen. 8. c. 5. "An executor shall, in the presence and by the discretion of two creditors or legatees, or other honest persons, make a true and perfect inventory of all the deceased's goods, and deliver one part thereof, on oath, to the ordinary." Raym. 471. 3. Burr. 1922.

(b) The executors were ordered to declare in prohibition, in order that the point might be more solemnly settled; and afterwards, on debate, a prohibition was granted, S. C. 1. Peer. Wms. 9.; for though the appointment of an executor is a gift to him of the whole, yet when a legacy is given, he is thereby excluded from the surplus, and is to be considered, as to that, a mere trustee, 1. Brown's

C. C. 332.; and therefore the spiritual court cannot compel an executor to make distribution, because they cannot enforce the execution of a trust, *Farrington v. Knightly*, 1. Peer. Wms. 549. The daughter, however, upon this prohibition being granted, brought a bill in chancery, as next of kin, against the executors, for an account of the surplus; and it was decreed, that it should go according to the statute of Distributions. S. C. 1. Peer. Wms. 10.—See *Lord Bristol's Case*, 2. Vern. 645. 3. Peer. Wms. 194. *notis*; the case of *Foster v. Munt*, 1. Peer. Wms. 550. 1. Stra. 673.—But see the distinctions upon this subject, *Bowker and Others v. Hunter*, 1. Brown's Cases Chan. 328.

MICHAELMAS

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THE TEST OF THE TONGUE
The tongue is the most important organ of the mouth. It is the organ of taste, and it is the organ of speech. It is the organ of the sense of touch, and it is the organ of the sense of pain. It is the organ of the sense of smell, and it is the organ of the sense of sight.

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MICHAELMAS TERM,

The Eighth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* Hallet against Byrt and Others.

* [248]

Case 123.

Trinity Term, 8. Will. 3. Roll 23.

DORSET, } JOHANNES BYRT, nuper de SOUTHMORE- Vide 2. Salk,
ff. } TON in com. præd. yeoman, et ERASMUS HAL- 280.
LET, nuper de BEAMINSTER, in com. præd. yeoman, attach. fuer.
ad respondendum THOMÆ HALLETT lanio de placito quare ipsi
simul cum THOMA HALLETT, nuper de SOUTHMORETON, in
com. præd. yeoman, vi et armis averia ipsius THOMÆ HALLETT
lanii pretii viginti librarum apud BEAMINSTER præd. invent. et
existen. absque aliqua rationabili causa ceperunt et abduxerunt per
quod idem THOMAS averia sua præd. penitus amisit et alia enormia
ei intulerant ad grave damnum ipsius THOMÆ HALLETT lanii et
contra pacem domini regis nunc et nuper dominæ reginæ MARIE
ANGLIÆ, &c. Et unde idem THOMAS per WILLIELMUM BALL
attorn. suum queritur quod præd. JOHANNES et ERASMUS simul
cum, &c. primo die Augusti anno regni domini regis nunc et nuper
dominæ MARIE reg. ANGLIÆ sexto vi et armis, &c. averia ipsius
THOMÆ HALLETT lanii VIDELICET tres vaccas ANGLICE COWS
et tres juvenas ANGLICE heifers pretii, &c. apud BEAMINSTER
præd. invent. et existen. absque aliqua rationabili causa ceperunt et
abduxerunt per quod idem THOMAS averia sua præd. penitus amisit
et

HALLET
egant
BYRT AND
OTHERS.

et alia enormia, &c. ad grave damnum, &c. et contra pacem, &c. unde dicit quod deteriorat. est et damnum habet ad valentiam 40 librarum; et inde producit sectam, &c.

• [249]

Et præd. JOHANNES BYRT et ERASMUS HALLETT per EGI-
DIUM CLARKE attorn. suum ven. et defen. vim et injuriam, &c.
et quoad venire vi et armis seu quicquid quod est contra pacem dicti
domini regis nunc et * nuper dominæ MARIÆ reg. nec non totam
transgression. præd. præter captionem et abduction. præd. trium vac-
carum de averiis præd. in narratione præd. superius mentionat. di-
cunt quod ipsi in nulla sunt culpabiles modo et forma prout præd.
THOMAS HALLET lanius superius inde versus eos narravit; et de
hoc ponunt se super patriam; et præd. THOMAS HALLET lanius
similiter. Et quoad captionem et abductionem præd. trium vaccarum
iidem JOHANNES et ERASMUS dicunt quod præd. THOMAS HAL-
LET lanius actionem suam præd. inde versus eos habere seu manu-
tenere non debet quia dicunt quod hundredum de BEAMINSTER in
com. DORSET præd. est antiquum hundred. quodque diu anteq. præd.
tempus quo supponitur caption. et abduction. vaccarum præd. fieri
scilicet decimo die Maii anno reg. dom. JACOBI SECUNDI nuper regis
ANGLIÆ, &c. primo reverendus in Christo pater ac dom. dominus
SETHUS tunc EPISCOPUS SARUM seist. fuit ut de feodo et jure
in jure episcopatus sui SARUM præd. de et in hundredo præd. cum
pertin. quodque idem episcopus et omnes prædecessores sui et omnes ill.
quorum stat. dictus dominus episcopus tunc habuit in hundredo præd.
a tempore cujus contrarii memoria hominum non existit habuerunt et
habere consueverunt quandam curiam hundred. de actionibus per-
sonalibus non attingen. ad quadraginta solid. et de replegiare (a) vetit.
namio infra hundred. præd. emergen. a tribus septimanis in tres
septimanas infra hundredum præd. hundred. præd. coram liberis
sectatoribus curiæ præd. tenend. Et iidem JOHANNES et ERASMUS
ulterius dicunt quod ipse idem episcopus et omnes illi quorum stat.
ipse tunc in eodem hundred. habuit a tempore cujus contrarium me-
moriam hominum non existit usi fuerunt et consueverunt per se vel
seneschallum suum hundredi prædicti. super querimoniam domino hun-
dredi præd. pro tempore existen. vel seneschallo suo hundredi præd.
in ea parte facti. in prædicta curia hundredi præd. vel extra eandem
curiam infra hundred. præd. averia personæ sic querentis infra
hundredum præd. injuste capt. et detent. tali quer. infra hundred.
præd. replegiare et deliberare vel replegiari et deliberari causare. Et
iidem JOHANNES et ERASMUS ulterius dicunt quod præd. SETHUS
EPISCOPUS SARUM de hundred. præd. sic ut præfertur seist. existet.
ipse idem episcopus postea scilicet undecimo die Maii anno regni dicti
domini JACOBI II. nuper regis ANGLIÆ, &c. primo * supradicti.
apud BEAMINSTER præd. in com. præd. per quandam indenturam

• [250]

(a) That is, where a lord of a franchise
forbiddeth his bailiff to deliver the dis-
sents taken by him to the sheriff when he
comes to replevy. 2. Inst. 140.

Quære, Whether one can prescribe to

have a jurisdiction de vetito namio? for
it is not incident to a court-baron, or hun-
dred-court, as the cognizance of a personal
action under 40s. is.

Hallett
against
BYRT AND
OTHERS.

suam inter ipsum episc. ex una parte et quendam CARLETON WHITLOCK de MEDIO TEMPO LONDON ar. ex altera parte fact. cujus quidem indenturæ unam partem sigillo ipsius episc. sigillat. iidem JOHANNES et ERASMUS hic in curia proferunt cujus dat. est die et anno ult. supradictis præd. episc. concessit eidem CARLETON et hæredibus et assign. suis inter alia totum illud hundredum de BEAMINSTER in com. præd. curias letas, curias de visu franci plegii, et omnia alia rectas jurisdictiones franchises. privileg. libertates proficua commoditates emolumenta et hæreditament. quæcunque cum pertinen. dict. hundred. spectan. penden. sive pertinen. habend. et tenen. dict. hundred. de BEAMINSTER præd. præfat. CARLETON WHITLOCK hæred. et assign. suis pro et duran. vitis præd. CARLETON WHITLOCK et KATHARINÆ uxoris ejus et ANDRÆ HENLEY de BROMHALL in com. SOUTH'TON bar. et pro vita eorum diutius viventis; virtute cujus quidem concessionis idem CARLETON de hundredo præd. cum pertin. fuit et adhuc est inde seist. et sic inde seist. existen. ante præd. tempus quo supponitur caption. et abduction. vaccar. præd. fieri præd. THOMAS HALLET modo quer. et quidam JOHANNES RODBART averia videlicet præd. tres vaccas in narratione præd. superius mentionat. existen. averia cujusdem TH. HALLET jun. yeoman apud BEAMINSTER præd. infra hundred. præd. ceperunt et ea apud BEAMINSTER præd. ac infra hundred. præd. imparcaverunt, per quod idem THOMAS HALLET junior yeoman ante præd. tempus quo, &c. scilicet tricesimo die Maii anno regni dom. WILLIELMI et nuper dom. MARIÆ reginæ ANGLIÆ, &c. sexto supradict. apud BEAMINSTER præd. infra hundred. præd. cuidam HENRICO SAMWAIES gen. adtunc et ibidem seneschallo præd. CARLETON WHITLOCK curiæ hundred. sui præd. questus fuit de præfat. THOMAS HALLET modo quer. et præfat. JOHANNES RODBART de injusta caption. et detentione averiorum suorum præd. existen. vaccæ in narratione præd. mentionat. et adtunc et ibidem levavit quandam querelam suam in hundredo præd. in placito caption. et injustæ detentionis averiorum suorum præd. et invenit eidem CARLETON WHITLOCK pleg. tam de clamore suo prosequen. quam de averiis ill. retornan. si retorn. inde adjudicaretur. Super quo quidem HENRICUS SAMWAIES adtunc seneschallus curiæ hundredi præd. postea scilicet eodem tricesimo die Maii anno sexto suprad. apud BEAMINSTER infra hundred. præd. per quoddam warrantum in scriptis sub sigillo suo quo in ea parte usus fuit sigillat. ballivo hundredi de BEAMINSTER præd. necnon præfat. ERASMO HALLET direct. eis mandavit quod vaccas præd. præfat. THOMÆ HALLET junior yeoman sine dilatione replegiari et deliberari facerent; et pon. per vad. * et salvos pleg. præfat. THOMAM HALLET lanium et JOHAN. RODBART quod essent ad prox. curiam hundredi præd. apud BEAMINSTER infra hundred. præd. tenen. vicesimo die Junii tunc prox. sequen. ad responden. præfat. THOMÆ HALLET jun. yeoman de placito caption. et injustæ detentionis averiorum suorum præd. Quod quidem warrantum postea et antea præd. tempus quo, &c. scilicet eodem tricesimo die Maii anno sexto supradict. apud BEAMINSTER præd. in com. præd. idem

THOMAS

* [251]

Hallet
Byrt and
Othell.

THOMAS HALLET jun. yeoman præfat. ERASMO HALLET cui idem warrantum in forma præd. direct. fuit deliberavit in forma juris exequen. Virtute cuius quidem warranti idem ERASMUS et præfat. JOHANNES BYRT in auxilium ipsius ERASMI et ad ejus requisitionem postea scilicet die et anno ult. suprad. apud BEAMINSTER præd. in com. præd. infra hundred. præd. dicta averia præd. THOMÆ HALLET jun. yeoman ceperunt et abduxerunt et replegiaver. et dict. THOMÆ HALLET jun. yeoman ibidem secundum formam et effectum warranti præd. deliberaver. qui eadem ex deliberatione illa ibidem adtunc recepit et adtunc et ibidem præd. ERASMUS posuit per vadios et salvos pleg. præd. THOMAM HALLET lanium et JOHANNEM RODBART quod essent ad præd. tunc prox. curiam hundredi præd. apud BEAMINSTER præd. tenen. ad responden. præfat. THOMÆ HALLET jun. yeoman de placito captionis et injustæ detentionis averiorum suorum præd. quæ est eadem captio et abductio vaccarum præd. unde præd. THOMAS HALLET lanius superius se modo queritur; absq. hoc quod præd. JOHANNES et ERASMUS sunt culpabiles de captione et abductione vaccarum præd. vel alicujus vaccæ inde ad aliquod tempus ante confectiõn. warranti præd. seu post retorn. inde seu aliter vel alio modo quam ut præd. JOHANNES et ERASMUS superius placitando allegaverunt. Et hoc parat. sunt verificare; unde pet. judicium si præd. THOMAS HALLET lanius actionem suam præd. inde versus eos habere seu manuteneat, &c.

E. N.

Et præd. THOMAS HALLET lanius quoad præd. placitum præd. JOHANNIS et ERASMI quoad caption. et abduction. præd. trium vaccarum superius in bar. placitat. dicit quod ipse per aliqua per præfat. JOHANNEM BYRT et ERASMUM superius placitando allegat. ab actione sua præd. inde versus eos haben. præcludi non debet; quia dicit quod placitum præd. per præd. JOHANNEM et ERASMUM modo et forma præd. superius placitat. materiaque in eodem content. minus sufficent. in lege existunt ad ipsum THOMAM ab actione sua præd. versus præd. JOHANNEM et ERASMUM haben. præcluden. quodque ipse idem THOMAS ad placitum illud modo et forma præd. superius placitat. necesse non habet nec per legem terræ tenetur aliqua modo respondere. Et hoc parat. est verificare; unde pro defectu sufficientis responsionis in hac parte idem THOMAS HALLET pet. judicium et damna sua occasione transgressionis illius sibi adjudicari, &c. et pro causis morationis in lege in hac parte juxta formam statuti in hujusmodi casu nuper edit. et provis. idem THO. HALLET lanius demonstrat et curiæ hic ostendit has causas sequen. videlicet pro eo quod placitum præd. tendit ad generalem exitum ac est duplex repugnans incertum et caret forma, &c.

B. S.

Joinder in demurrer.

Hallet

Hallet against Byrt.

Case 124.

TRESPASS against Byrt and Hallet, for taking and detaining the plaintiff's cattle.

The defendants plead *not guilty* as to all, but the taking three cows: and as to that, they say, that the *hundred of Beaminster* is an ancient hundred, whereof the *Bishop of Salisbury* was seised in fee, and that he and his predecessors have time out of mind kept a court there from three weeks to three weeks, for the trial of personal actions, under the value of forty shillings, and so prescribes to grant *replevins* either by himself or steward in court, or out of court, upon complaint made to them of the taking, and unjustly detaining, any cattle within the said hundred; that the *Bishop* afterwards conveyed this hundred to one *Whitlock* for three lives, by virtue whereof he was seised; that the plaintiff and one *Rodbart* took and impounded the cows within the said hundred, being the cows of a stranger, who made complaint thereof to the steward, and he directed his warrant to the bailiff of the hundred, and to the said *Hallet*, commanding them to replevy the cattle; by virtue whereof, *Hallet*, and the other defendant *Byrt*, in *auxilium ejus*, did take and deliver them to the owner; and traversed that they were guilty of the taking at any time before the warrant, or after the return, *aliter vel alio modo*.

The plaintiff demurred, and shewed for cause, that this plea amounted to the *general issue*.

BUT IT WAS ARGUED, to maintain it, that there was sufficient colour to make this plea good, for in an action of trespass, possession is a good colour; and the defendant may have the benefit of such plea when the substance of it is by way of excuse, though he might have pleaded the *general issue*.

* **CONTRA.** The plaintiff has declared for taking his cattle, and the defendants plead, that the property was in another, so that they are *not guilty* of taking his cattle; which pleading might have been good in *replevin*, but not in an action of *trespass* (a). And to this purpose a case was cited (b), where in trespass for breaking his close, and taking away twenty load of wood, the defendant pleaded, as to breaking the close, that he had a lease of it at will from the plaintiff himself, by virtue whereof he entered; and as to the carrying away the wood, that another was possessed thereof, and of the said close, who made his son executor and died; and that the said executor gave the twenty load of timber to the defendant; and traversed that he took any of the plaintiff's wood; and the Court held this to be no more than the *general issue*. When such pleading has been allowed to be good, it was

In trespass for taking three cows, A PLAINTIFF that the cows were the property of A; that the plaintiff impounded them; that A made replevin thereof in the hundred court; and that he the defendant took them by virtue of a precept granted by the said hundred court, and delivered them to the said A and so justifying under a prescriptive right in the hundred court to hold pleas in replevin, is held as amounting to the general issue; for being by way of justification, it ought to confess and avoid the cause of action: but so far from evengiving colour to the plaintiff, it does not shew that he had any possession in the cows at the time of the taking; but on the contrary, by saying they were impounded, shews they were in the custody of the law, and not in possession of the party.

* [253.] S.C. 1. Salk. 394.

S. C. 2. Salk. 580. S. C. Carth. 320. S. C. Skin. 674. S. C. 3. Salk. 272. S. C. 12. Mod. 120. S. C. 1. Ld. Ray. 218. Ante. 175. Post. 314. Skin. 362. 3. Leon. 94. 2. Mod. 274. 5. Com. Dig. "Pleader" (E. 14.) 4. Bac. Abr. 61. 64. 375.

(a) Year Book 27. Hen. 3. pl. 21. a.

(b) Year Book 9. Hen. 6. pl. 11. a.

where

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where the plaintiff had not alledged any property in the cattle, or where the defendant had confessed it: and therefore where the plaintiff declared of taking *quadam averia* (a), and the defendant pleaded that the property was in him, and that a stranger took them and put them in the plaintiff's close, by his assent, where he found and retook them, *prout ei bene licuit*, that plea was held good, for the plaintiff had not claimed any property in the cattle, but only that the defendant took *quadam averia*, and does not say *ipsius querentis*, as in this case (b). Besides, the defendant ought to have alledged not only a bare *possession*, but a reasonable *property* in this stranger: they say, that the plaintiff took the cattle mentioned in the declaration, *existen. averia cujusdem* THOMÆ HALLET *jun.* so that he might only have a *possession* of them. As where trespass (c) was brought for taking of boards, the defendant pleaded, that he was possessed of them, and gave them to the plaintiff to keep, and re-deliver to the defendant when he should be required, and he carried them to D. where the defendant retook them; this was held an ill plea, because the defendant had alledged no property in himself.

BUT THE COURT did not speak to this point.

THEY HELD, that at common law no *replevin* was made by *plaint*, for that was a remedy given by the statute of *Westminster the First*, cap. 16. the other was by *writ of Justicies in replevin* directed to the sheriff, who thereupon either went himself, or made a precept to his bailiff to make deliverance (d). * Now if the sheriff in his county-court, which is a court incident to his office, could not make a *replevin*, but by writ in open court, before the *statute of Marlbridge*, which gives a quicker remedy by *plaint*, and was made for the benefit of the owner of the cattle, that he should not stay for them till next court, how can the *hundred-court*, which is derived out of the *county-court*, prescribe to grant *replevins* out of court, when the authority of the sheriff himself so to do began by an act of parliament? It is true, all these courts do hold plea in *replevins* (e), but it is illegal, for the party ought to go to the sheriff for that purpose, whose court is in nature of a *court-baron*.

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Cro. El. 409.

Hob. 175.

Skin. 41.

Carth. 382.

Fitz. 51.

Cases in Law

and Equity, 133.

2. Mod. 297.

Therefore this custom was held to be void, for it was against law and reason: and so the plaintiff had judgment, the plea being naught.

(a) Rookewood v. Frazier, Cro. Eliz. 162.

(b) Cro. Eliz. 329.

(c) Year Book 5. Hen. 7. pl. 18. Bro. Abr. "Colour," pl. 43.

(d) Fitz. N B. 68. Dyer, 246. Co. Lit. 145. Gilbert's Law of Distress and Replevin, 59. 3. Bl. Com. 147.

(e) Bro. Abr. "Plaint," pl. 66.

Case 125. The King against The Mayor and Burgeffes of Wilton.

Mandamus to restore to the office of burgeffs of a corporation, &c.

GULIELMUS TERTIUS Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ rex, fidei defensor. &c. majori et burgenfibus burgi de WILTON in com. nostro WILTS salutem. Cum ELIAS CHALKE un. burgen, burgi præd. secundum consuetudinem libertat.

et

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et privilegia ejusdem burgi debito modo elect. et prefat. fuit cum-
quidem ELIAS CHALKE in locum et officium un. burgen. burgi diu
se bene gessit et gubernavit; vos tamen major et burgen. burgi præd.
præmissa parvi pendentes præd. ELIAM CHALKE indebite et
absque causa rationabili ab officio et loco un. burgen. burgi præd.
minus juste amovistis in nostrum contemptum et ipsius ELIÆ
CHALKE daninum non modicum et gravamen et status sui læsionem
manifestum sicut ex querela sua accepimus; nos igitur præfat. ELIÆ
CHALKE debitam et festinam justitiam in hac parte fieri volentes
at est justum, vobis et cuilibet vestrum mandamus sicut alias vobis et
cuilibet vestrum mandavimus firmiter injungen. quod immediate post
receptionem hujus. brevis præd. ELIAM CHALKE in locum et
officium unius burgensium burgi de WILTON præd. restituitis seu
restitui faciatis una cum omnibus libertatibus privileg. præemi-
nentiis et commoditatibus ad locum et officium spectant. et pertinen.
vel causam nobis significetis in contrarium ne in vestro defectu querela
ad nos perveniat iteratim; et qualiter hoc præceptum nostrum fuit
execut. nobis constare faciatis apud Westm. die Mercurii prox. post.
mensis Paschæ hoc breve nostrum nobis tunc remitten. sub pœna
quadraginta librarum. Teste J. H. mil. apud Westm. * secundo die
Maii anno regni regis octavo.

* [255]

ASTRY.

Per reg. cur. PARRY pro prosecut. executio istius brevis patet
in quadam schedul. huic brevi annex. respons. majoris et burgensium
burgi de WILTON ad breve huic schedulæ annex. secundum exi-
gentiam brevis præd. domino regi humillime certificamus quod præd.
burgus de WILTON est antiquus burgus quodque infra burgum
præd. talis habetur et a tempore cuius contrarium memoria hominum
non existit habebatur consuetudo quod major et burgeneses burgi illius
ad hoc electi et jurati extiterunt et fuerunt de seipsis corpus incor-
porat. et politicum in re factio et nomine per nomen major. et burgen.
burgi de WILTON in com. WILTS, et per idem nomen placitare et
implacitare placitari et implacitari consueverunt. Ac ulterius domino
regi certificamus quod per totum tempus supradict. iidem major. et
burgen. burgi præd. aliquem burgensium burgi præd. qui aliquid
ageret sive perpetraret in sacramenti sui læsionem aut quo quid detri-
menti caperet respublica major et burgeneses burgi præd. super
auditum huiusmodi burgensis taliter delinquer. et peccantis et pro-
batione inde ab officio et loco unius burgen. burgi præd. amovere
consueverunt et potuerunt. Et ulterius certificamus quod præd. ELIAS
CHALKE sexto die Maii anno regni domini CAROLI II. nuper
regis Angliæ, &c. 35º apud WILTON præd. electus et prefatus
fuit unus burgen. burgi præd. et eodem sexto die Maii anno 35º
supradicto apud WILTON præd. sacramentum præstitit corporale
coram tunc majore burgi præd. juxta antiquam consuetudinem burgi
præd. quod ipse idem ELIAS esset verus et fidelis corporationi majori et
burgen. burgi præd. et præstaret ANGLICE would yield optimum
certamen et auxilium suum pro dignitate ANGLICE the advance-
ment et utilitate ANGLICE the wealth inde et omnes terras et
possessiones

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possessiones ad inde pertinen. per omnes honestas et laudabiles vias et modos. Et ulterius domino regi certificamus quod postea et ante adventum brevis præd. idem ELIAS CHALKE apud WILTON præd. elect. et præfekt. fuit major burgi præd. et 23 die Octob. anno domini 1690. apud WILTON præd. sacramentum suum præstitit corporale modo quo alii majores præd. consueverunt, quod ipse videret quantum posset quod redditus burgensium et communis burgi præd. applicarentur ANGLICE employed ad emolumentum eorumdem ac etiam in omnibus negotiis substan. tangentibus sive concernentibus burgi præd. consuleret fratres suos et minime concluderet inde nisi cum eorum consensu; posteaque iterum elect. idem ELIAS scil't 13. die Octobris anno domini 1693 iterum jurat. fuit major burgi præd. modo quo prius et major burgi præd. fuit et continuavit per spatium unius anni * integri post quodlibet temporum præd. quo ipse jurat. fuit major burgi præd. ut præfertur. Et ulterius domino regi certificamus quod præd. ELIAS CHALKE sacramenta sua præd. vili pendens et dignitatem sive utilitatem corporationis major. et burgen. burgi præd. minime curan. ipse idem ELIAS ministrus burgi præd. per commune concilium corporationis præd. debite electos et qui per commune concilium corporationis præd. et non aliter ab officiis suis amoverentur arbitrarie amovit ab officiis suis auctoritatis suæ colore absque consensu vel assensu communis concilii præd. scil't ROBERTUM PAINE commun. clericum corporation. præd. WILL'UM COWDREY jun. servien. ad clavum et recepit separales denariorum summas debitas et solubiles majori et burgensibus burgi præd. quas ipse idem ELIAS in usum suum proprium convertit et disposuit apud WILTON præd. et computum inde majori et burgensibus burgi præd. minime reddidit scil't unam libram et duodecim solidos per ipsum recept. pro redditu tolnei pontis in HARNEHAM in com. præd. ac debit. corporationi, ac etiam monetam per ipsam de corporatione præd. recept. secundum ordinem et consuetudinem ibidem usitat. minime disposuit, viz. decem solidos debit. ELIÆ GLIDE ballivo majoris burgi præd. Ac etiam idem ELIAS CHALKE clandestine et absque consensu corporationis præd. causavit quandam intrationem electionis cuiusdam JACOBI HOPGOOD esse membrum corporationis præd. obliterari ANGLICE to be struck out a quodam libro VOCAT. the ledger-book de et pertinen. præd. corporationi et manum suam propriam alie intrationi in loco intrationis sic ut præfertur obliterata et erasæ scripsit et inseruit in libro præd. existen. libro in quo actus publici rempublicam majoris et burgensium burgi præd. aliquantulum tangentes memorantur et recordantur. De quibus omnibus aliisque criminibus ei object. et per ipsum existentem burgen. burgi præd. in sacramenti sui præd. lationem et reipublicæ præd. majoris et burgensium burgi præd. detrimentum fact. et perpetrat. ipso eodem ELIA CHALKE in communi concilio ANGL. assembly major. et burgensium burgi præd. plenius audit. et super probation. examination. et matur. consideration. inde iidem major et burgen. burgi præd. in communi concilio præd. apud GUILDHALL burgi præd. 28 die Augusti an. Dom. millesimo sexcentesimo nonagesimo quinto assemblat. ordinaverunt eundem ELIAM CHALKE

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CHALKE *ab officio et loco unius burgen. burgi præd. amoveri*
 ANGLICE disfranchised *et per eundem ordinem fuit amotus inde*
et redditus incapax aliquid amplius agen. ut membrum ejusdem
corporationis hisque de causis eundem ELIAM CHALKE *in locum et*
officium unius burgensium burgi præd. restituere non possumus.

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W. SHARPE, Major.

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* The King against The Mayor and Burgeses of Wilton. Cafe 126.

MANDAMUS to restore one *Elias Chalke* to the place of a
 burges in *Wilton*. *Mandamus to restore to the office of burges of*

The return was, That *Wilton* is an ancient borough, wherein a corporation, and the return made thereon.
 there was a custom, that the mayor and burgeses should be a body incorporate, and that they might displace any burges who should act any thing against his oath, or against the interest of the borough, upon hearing the offence, and proof of his crime: That *Elias Chalke* was chosen a burges there in the month of *May*, in the twenty-ninth year of *Charles the Second*, and then took an oath to be faithful and true to the corporation, and to endeavour the advancement thereof: That he was afterwards chosen MAYOR of the said corporation, and took an oath, that the rents thereof, as far as he could, should be employed for the profit of the said corporation; and that in all matters of moment he would consult his brethren, and conclude on nothing without their consent: But that he, not regarding his oath, and neglecting the profit of the corporation, did arbitrarily discharge *Robert Paine* and others from their offices there, and that they ought not to be removed but by the common-council: That he received several sums of money due to the corporation, and converted the same to his own use, without giving any account thereof: That he has made undue entries of elections of members of the corporation in their ledger-book: and sets forth all these matters in particular. For which, and other crimes, he being heard in common-council, and it being proved upon him, the mayor and burgeses of the said borough, being assembled in common-council, did disfranchise him, and made him incapable to hold that office of burges any longer; for which reasons they could not restore him.

Vide ante, 10,
 11. post. 314.
 404. 452.
 6. Mod. 18.

S. C. 2. Salk.
 428.

Those who argued against this return, said,

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FIRST, That it was insufficient and illegal: for if the mayor and burgeses have an authority to disfranchise, and this general custom, as returned, shall extend to such things which they may lawfully do, yet they have not well pursued it, because it does not appear that he was *summoned* to answer these offences which are laid to his charge, or that he had due notice to defend himself; for a man may be heard as it is alledged in the return, but not in his own defence. * Therefore a summons is necessary in all

A return to a mandamus to restore, stating that the party disfranchised was heard in his defence, is sufficient, without saying that he was summoned.

S. C. 2. Salk. 428. 1. Vent. 19. 11. Co. 99. Stiles, 151. 447. 2. Stra. 537. 819. 2. Ld. Ray. 1334. Cowp. 523.

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such cases, and not generally, but to answer those particular matters. Thus it is, if the party leave the corporation, and inhabit elsewhere; in such case a general summons is not sufficient, it must specify the offence of which he is accused; and therefore a general return of a summons, *viz. quod licet sæpius requisitus fuit*, has been held insufficient to turn a man out of his freehold (a). The end of a summons is to bring the party to give his answer by the ordinary process of the court, and likewise to give him notice of his accusation, and therefore it ought to be particular: so that though it be returned, that he was fully heard *de omnibus criminibus*, yet without a summons he may not be prepared to answer, or to make a full defence. Agreeable to this, is the resolution in *James Baggs's Case* (b), that notwithstanding a corporation have an authority to remove either by charter or prescription, and have a just cause so to do; yet if it appear by the return of a *mandamus*, that they have proceeded against the party without hearing him to what was objected, or that he was not reasonably warned, such a disfranchisement is void, and shall not bind the party (c).

A return, to a *mandamus* to restore, "that the party disfranchised was fully heard on THAT and all other crimes in common council," without saying before whom, is bad.

SECONDLY, The return is uncertain; for it is, that he was *plenius audit. de omnibus aliis criminibus*, &c. and that upon proof thereof he was disfranchised; which is not sufficient to justify it, because it is not positively set forth that he was heard concerning those other crimes laid to his charge, or before whom he was heard. It is true, it is alledged, that he was heard *in communi concilio*, who might be assembled in the council-house not to consult but to feast; it should have been, that it was heard *apud commune concilium*, &c. So it was held in the case of the *Mayor of Gloucester* (d), who returned, that he called to him thirty of the council *in domo concilii assembleat*, and did remove the party: this was held insufficient, because it did not appear that it was *apud commune concilium*. Then they return, that the crimes were proved upon him, but do not say by what proof, or that it was upon oath. Now proof without describing in what manner, must be such which is allowed at common law (e); and that is by jury, which was not in this case.

* [259]

A return to a *mandamus*, that the party was heard of that & other crimes, without stating what crimes, is bad.

Ray. 153. 365. A32.

S. Salk. 432.

THIRDLY, It does not appear but that those other crimes may be such for which they could not justify this disfranchisement. They should have returned, that he was required to make his defence to particular crimes objected against him; for in all returns of this nature there must be a precise certainty, and the Court will intend nothing but what is sufficiently alledged. Besides, the crimes which are expressed, are not so certainly set forth that this Court may judge of the cause of this proceeding against

1. Sid. 209. Fitzg. 123. 1. Keb. 716. 1. Show. 182.

(a) Rex v. Glyde, 4. Mod. 33. to 38.

S. C. 1. Show. 364. S. C. 1. Ld. Ray. 223.

5. Com. Dig. "Mandamus," (D. 4.)

(i) 11. Co. 99.

(c) Stiles, 151. 446. 452.

(d) 3. Bulst. 189. Poph. 133. 1. Roll Rep. 409.

(e) 1. Sid. 313.

the

Michaelmas Term, 8. Will: 3. In B. R;

the party; for it is said, that he removed the servants of the corporation from their offices, who ought not to be removed but by the common-council. Now it does not appear what interest those persons had in their offices, or that they were removed by him against their consent, for it may be that they surrendered willingly,

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FOURTHLY, They return, that AN ORDER was made to disfranchise him, and that by virtue of that order he was made incapable of acting as a member of the corporation. This is also insufficient, because they cannot remove any one by virtue of an order; it must be by a corporate act under the common seal.

A corporation cannot remove a corporator by an order; it must be by an act under common seal.

Comb. 41. 279. 324. Moor, 548.

FIFTHLY, As to his receiving money due to the corporation, and converting it to his own use, without giving any account thereof, they do not say, that they required him to give an account, and that he refused.

A return that a burgess did not account, without saying he was requested and refused, is bad.

SIXTHLY, As to his striking out an election of a member in the ledger-book, and signing another entry instead of that struck out, this does not appear to be any crime in him, for they do not say, that such was an undue entry; he might strike it out with an intent to write another who was lawfully chosen. It is not objected against him as an abuse, or falsity.

24. If making false entries in the books of a corporation be cause of disfranchisement.

For which reasons a peremptory *mandamus* was prayed.

It was argued on *the other side*, and THE COURT inclined, that there need not be any *summons* to answer particular matters; neither does *Baggs's Case* say that the party should be *summoned*: it is sufficient if he has been heard, which may be done, and was in this case without any *summons*, and if heard, the Court will intend that it was in his defence; so that there is no need of a *summons* at all, because the intent of it is answered.

2. Salk. 428.
435
Palm. 453.
Stiles, 51. 446.
452.
3. Bulst. 189.
2. Keb. 489.

But this was not the grounds of the *peremptory mandamus*, which was granted for the other reasons above-mentioned.

* *Pleas before the Lord the King at Westminster, of the Term of Saint Hilary, in the sixth Year of the Reign of the Lord William the Third, King of England, &c.* * [260]
Roll. 729.

Leigh against Brace.

Case 127.

WORCESTERSHIRE, } BE it remembered, that on *Wednesday* next after eight days of *Saint Hilary*, in this same Term, before the lord the king at *Westminster*, came *George Leigh* by *Thomas Callow* his attorney, and brought here into the court of the said lord the king then there his certain bill against *Samuel Brace*, in custody of the marshal, &c. of a plea of trespass and ejectment; and there are pledges

Count in ejectment.
S. C. 3. Ld.
Ray. 99.

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against
Brace.*

of prosecuting, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit: *Worcestershire*, to wit, *George Leigh* complains of *Samuel Brace*, in custody of the marshal of the *Marshalsea* of the lord the king, being before the king himself, for that, to wit, That whereas one *John Cooks*, on the first day of *October*, in the 6th year of the reign of the lord *William* the now king and lady *Mary*, late queen of *England*, &c. at the parish of *Bromsgrove*, in the county aforesaid, demised, granted, and to farm let to the aforesaid *George*, one messuag^y, thirty acres of land, ten acres of meadow, and twenty acres of pasture, with the appurtenances, situate, lying and being in the parish of *Bromsgrove* aforesaid, in the county aforesaid, to have and to hold the tenements aforesaid, with the appurtenances, to him the said *George* and his assigns, from the feast day of *Saint Michael* the archangel, then last past, unto the full end and term of seven years from thence next following, and fully to be complete and ended; by virtue of which said demise, the said *George* entered into the tenements aforesaid, with the appurtenances, and was possessed thereof until the aforesaid *Samuel* afterwards, to wit, on the same first day of *October*, in the sixth year above said, with force and arms, into the tenements aforesaid, with the appurtenances, in and upon the possession of him the said *George*, entered thereupon, and him the said *George*, from his farm aforesaid, his said term thereof not being ended, ejected, expelled, and removed, and him the said *George*, from his possession aforesaid thereof, kept out, and yet keeps out, and other wrongs to the said *George* then and there did, against the peace of the said lord the now king and the late lady the queen, and to the damage of him the said *George* of ten pounds; and thereupon he brings suit, &c.

Not guilty.

And the said *Samuel*, by *John Hancocks* his attorney, comes and defends the force and injury when, &c. and saith that he is not guilty thereof; and of this he puts himself upon the country; and the said *George* likewise; therefore let a jury come before the lord the king at *Westminster*, on *Tuesday* next after eight days of the Purification of the Blessed Virgin *Mary*; and who neither, &c. to take cognizance, &c. because as well, &c. The same day is given to the party aforesaid there, &c. * Afterwards the process thereupon is continued between the parties of the plea aforesaid by the jury being thereupon respited between them before the lord the king at *Westminster* until *Wednesday* next after fifteen days of *Easter*, from thence next following, unless the justices of the lord the king, assigned to take the assizes in the county aforesaid, shall first come on *Saturday* the second day of *March*, at *Worcester*, in the county aforesaid, by form of the statute, &c. for want of jurors, &c. At which day, before the lord the king, at *Westminster*, cometh the said *George*, by his said attorney, and the said justices before whom, &c. have sent here their record, had before them in these words, to wit: Afterwards, on the day and at the place within contained, before *GILES EYRE, Knight*,
one

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Nisi prius.

Postea.

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Special verdict.

one of the justices of the lord the king, assigned to hold pleas before the king himself, and THOMAS BRETON, *Esq.* to him the said GILES EYRE and WILLIAM GREGORY, *Knight*, another justice of the said lord the king, assigned to hold pleas before the king himself, justices of the said lord the king, assigned to take the assizes in the county of *Worcester*, by form of the statute, &c. for this time associated, the presence of the said WILLIAM GREGORY not being expected, by virtue of the writ of the lord the king, of *si non omnes*, &c. come as well the within-named *George Leigh*, as the within-written *Samuel Brace*, by their attornies within contained; and the jurors of the jury, whereof mention is within named, being called, come, who being chosen, tried, and sworn to speak the truth concerning the matters within contained, say, upon their oath, that one *Walter Brace* was seised of the tenements in the declaration within-mentioned, in his demesne as of fee; and being so seised thereof, the said *Walter Brace*, before the said time when, &c. to wit, on the twenty-fifth day of *July*, in the twentieth year of the reign of the lord *James the First*, late king of *England*, &c. by his certain charter, sealed with the seal of him the said *Walter*, and to the jury aforesaid in evidence shewn, the date whereof is the same day and year, enfeoffed *Thomas Wilkes* and *Thomas Flavell* of and in the tenements aforesaid, with the appurtenances, to have and to hold to them the said *Thomas* and *Thomas* and their heirs, to the uses in the said charter specified, the tenor of which said charter follows in these words: To all christian people to whom this present writing shall come, *Walter Brace* of *Forkbury*, in the parish of *Bromsgrove*, in the county of *Worcester*, yeoman, sendeth, greeting: Know ye, that I the said *Walter Brace*, for the natural love and affection that I bear unto my son *Thomas Brace*, and for divers other considerations me specially moving, have given, granted, enfeoffed, and confirmed, and by these presents do give, grant, enfeoff, and confirm, unto *Thomas Wilkes*, of *Forkbury* aforesaid, yeoman, and unto *Thomas Flavell*, of *Bromsgrove* aforesaid, clerk, their heirs and assigns, all that dwelling-house or tenement, with the appurtenances, which I, the said *Walter Brace*, purchased of *Stephen Dipple* of *Bromsgrove* aforesaid, and is situate in the high street * of *Bromsgrove*, between the land of *Edward Seabright*, *Esq.* and the lands of *Gilbert Butler*, *Gent.* and now in the tenure or occupation of *Walter Rose*; and also one other house or cottage, with the appurtenances, situate and being in *Forkbury* aforesaid, wherein *Gilbert Westley* now dwelleth, together with the close wherein the said cottage standeth, containing, by estimation, one acre and an half, or thereabouts, be the same more or less; one other close of pasture, called by the name of *Whern's Close*, containing, by estimation, three acres, or thereabouts; one other close of pasture, called by the name of *Woodfell*, containing, by estimation, five acres, or thereabouts; two other closes, called the *Slade Crofts*, containing, by estimation, six acres, or thereabouts; one day mowth of meadow ground, lying in *Long*

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Meadow next unto the estate there, and two fleeting acres lying in *Broad Meadow*; with all ways, waters, woods, underwoods, commons, profits, commodities, advantages, and hereditaments whatsoever unto the said premises, and every part and parts thereof belonging, or in any wise appertaining; all which said premises are situate, lying and being in the said parish of *Broms-grove* and county of *Worcester*, to have and to hold the said houses or tenements, lands, and all and singular other the premises, with the appurtenances, and every part thereof, to the said *Thomas Wilkes* and *Thomas Flavell*, their heirs and assigns, to the uses, intents, and behoofs herein-after by these presents mentioned and declared, and to no other use, intent, or purpose; that is to say, to the use and behoof of me the said *Walter Brace*, for and during my natural life, and after the decease of me the said *Walter Brace*, to the use and behoof of the aforesaid *Thomas Brace*, my son, and his heirs for ever; and for default of issue of the body of the said *Thomas Brace*, then to the use and behoof of the right heirs of me the said *Walter Brace* for ever, to be holden of the chief lord or lords of the fee or fees of the premises, by the rents and services thereof first due and of right accustomed: And I, verily, the said *Walter Brace* and my heirs, the said houses or tenements, lands, and all and singular other the premises, with the appurtenances, and every part and parcel thereof, unto the said *Thomas Wilkes* and *Thomas Flavell* and their heirs, shall and will warrant, and for ever defend by these presents. In witness whereof, I, the said *Walter Brace*, unto this my present writing indented, have set my hand and seal the twenty-fifth day of *July*, in the reign of our sovereign lord King *James*, by the grace of God, of *England*, *France*, and * *Ireland*, king, defender of the faith, &c. the twentieth, and of *Scotland* the fifty-fifth, *annoque Domini* 1622. By virtue whereof, and also by force of the act of parliament for transferring of uses into possession made and provided, the said *Walter* was seised of the premises in the said charter mentioned, being the premises aforesaid in the declaration aforesaid specified, as of his freehold, for the term of his life, the remainder thereof to the said *Thomas Brace* belonging, as the law requireth. And the said jurors further upon their oath say, that the aforesaid *Walter Brace* afterwards, and before the said time when, &c. died, and that the said *Thomas Brace*, the son of him the said *Walter*, entered into the tenements, in the declaration within-written mentioned, and was seised thereof, as the law requireth; and that he the said *Thomas Brace*, being so seised thereof, in due manner and form made his last will and testament in writing, on the sixteenth day of *April*, in the thirty-third year of the reign of *Charles the Second*, late King of *England*, &c. which said will follows in these words: "In the name of God, Amen. The sixteenth day of *April*, in the thirty-third year of the reign of our sovereign lord *Charles the Second*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. *annoque Domini* 1681, I, *Thomas Brace*, of *Forkbury*, in the parish of *Broms-grove*, in the county

" of

“ of *Worcester*, yeoman, being weak of body, but of sound and perfect memory and understanding, thanks be to God, calling to mind the uncertain state of this life, and being desirous to settle things, in order for the leaving the world, I having lived in the enjoyment thereof till a very considerable age, do make this my last will and testament in manner following, revoking, by these presents, all and every other testament or testaments, will and wills heretofore by me made, either by word or writing, and this to be taken only for my last will and testament. First, I bequeath my soul unto God my creator, and to Jesus Christ my redeemer, and my body to the earth, from whence it was taken, to be decently buried in such christian manner as to my executor herein-after named shall be thought most convenient, there to rest until my soul and body shall meet again and be joined together at the Resurrection; And, touching such temporal estate as God has been pleased to bestow upon me, I do order, give, and bequeath the same in manner following: *Imprimis*, I do hereby give and devise unto my son *Samuel Brace*, during the term of his natural life, eight pounds a-year of lawful money of *England*, to be paid him quarterly from the time of my decease, by my executor herein-after mentioned, he my said son *Samuel* permitting and suffering *William Fowkes* and *Jonathan Wall*, their executors, administrators, and assigns, peaceably and quietly to hold and enjoy the lands and tenements and premises to them by me severally leased, at and under the covenants specified in their several leases; but if he molest or hinder the said *Jonathan Wall* and *William Fowkes* of their quiet enjoying the premises, or any part thereof, to them by me devised, then my will is, that my *said son *Samuel* have four pounds a-year only during his life, paid him quarterly by my executor, in full discharge and satisfaction of the said eight pounds a-year. *Item*, I give and bequeath unto my daughter *Elizabeth Brace*, three hundred pounds of like money of *England*, as followeth, *viz.* two hundred pounds within a year, and one hundred pounds more, the remaining part of the said three hundred pounds, within two years after my decease, if she so long live, or bear any issue of her body, with all my goods that shall be in my house at *Whern's Ash* at my decease. *Item*, I give to my grandson *Henry Cooks*, during his natural life, all that my messuage or tenement in *Forkbury*, with two acres of land to the same belonging, in the possession of one *William Perkes*, and four more acres of land to the same adjoining, in the possession of one *William Oxford*; the rents and profits of the said messuage, and several parcels of land, to be received and enjoyed by my executor till my said grandchild shall attain to the age of twenty-one years, for the maintenance and education of my said grandchild. *Item*, I give and devise to my grandchildren *Mary* and *Hannah Cooks*, all those my two closes of land in *Catfill*, adjoining to the common field there, called *Intall-field*, containing, by estimation, about four acres, and three several

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“ parcels

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"parcels of land in *Intall-field*, containing, by estimation, three
"acres. And lastly, I give and devise unto *John Cooks* my son-
"in-law, whom I make executor of this my last will, and to his
"heirs on the body of my daughter *Rebecca* begotten, or to be
"begotten, all my estate, lands, tenements, and houses whatsoever
"in *Forkbury* and *Catfild*, in the said parish of *Bromsgrove* and
"county of *Worcester*, and not herein-before devised, and the re-
"version of the said messuage and lands herin-before bequeathed
"unto my said grandchild *Henry Cooks*, from and after his decease,
"paying the legacies and annuities in this my will comprised, &c."
And the said jurors further upon their oath say, that the said
Thomas Brace afterwards died seised of the tenements aforesaid,
with the appurtenances as aforesaid; and that the tenements
aforesaid, with the appurtenances in the declaration aforesaid spe-
cified, and the tenements * aforesaid in the will aforesaid before
recited, and by the same expressed to be devised to the aforesaid
John Cooks in possession, are the same tenements, with the appur-
tenances, and not others or divers; and that the said *John Cooks*,
after the death of him the said *Thomas Brace*, into the tenements
aforesaid, being the tenements in question, entered by colour of
the will aforesaid, and was thereof seised, as the law requireth.
And the said jurors, upon their oath, further say, that the said
John Cooks, after the death of the said *Thomas Brace*, paid as well
all and singular the legacies and annuities in the same will men-
tioned and comprised, at such times, and in the manner and form,
as in the same will is directed, as all the just debts and funeral
expences of the said *Thomas Brace*, according to the true intention
of the said will. And the jurors aforesaid, upon their said oath,
further say, that the within-named *Samuel Brace*, the now defend-
ant, is the son and heir of the body of the said *Thomas Brace*;
and that the said *Samuel Brace*, after the death of the said *Thomas*
his father, entered into the tenements aforesaid, with the appur-
tenances, and was seised thereof, as the law requireth. And the
aforesaid *John Cooks*, afterwards, and before the said time when,
&c. to wit, on the within-written first day of *October*, in the sixth
year of the reign of the lord *William* now king of *England*, and
of the lady *Mary* late queen of *England*, &c. at the parish of
Bromsgrove aforesaid within-written, in the county aforesaid,
into the tenements aforesaid, with the appurtenances, entered,
and then and there demised, granted, and to farm let, to the said
George the tenements aforesaid, with the appurtenances, to have
and to hold the tenements aforesaid, with the appurtenances, to
the said *George* and his assigns, from the feast day of *St. Michael*
the archangel, then last past, unto the full end and term of seven
years from thence next following, and fully to be compleat and
ended: by virtue of which said demise he the said *George* entered
into the tenements aforesaid, with the appurtenances, and was
thereof possessed, until the said *Samuel*, the defendant, afterwards,
to wit, on the same first day of *October*, in the sixth year above-
said, into the tenements aforesaid, with the appurtenances; in and
upon

Michaelmas Term, 8. Will. 3. In B. R.

upon the possession of him the said *George* thereupon entered, and him the said *George* from his farm aforesaid, his term not being yet ended, ejected, expelled, and removed, and him the said *George* from his possession aforesaid thereof kept out, and yet keeps out. But whether upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said *Samuel Brace*, the now defendant, is guilty of the trespass and ejectment within-written, in manner and form as the said *George* within complains against him, or not, the jurors aforesaid are wholly ignorant, and thereupon pray the advice and consideration of the Court, &c. And if, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, it shall seem to the Court of the lord the king here, that the said *Samuel Brace*, the now defendant, is guilty of the trespass and * ejectment within-written, in manner and form as the said *George* within complains against him, then the said jurors further, upon their oath, say, that the said *Samuel Brace* is guilty of the trespass and ejectment within-written, in manner and form as the said *George Leigh* within complains against him; and they assess the damages of him the said *George Leigh*, by the occasion within written, besides his costs and charges by him about his suit in this behalf laid out, to sixpence, and for those costs and charges to forty shillings. But if, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, it shall seem to the Court here, that the aforesaid *Samuel Brace*, the now defendant, is not guilty of the trespass and ejectment within-written, in manner and form as the said *George* within complains against him, then they the said jurors further say, upon their said oath, that the said *Samuel Brace* is not guilty of the trespass and ejectment in the declaration within-written specified, as the said *Samuel Brace* within for himself in pleading hath alleged. And because the Court of the lord the king now here is not yet advised of giving their judgment of and upon the premises, day is thereupon given to the parties aforesaid before the lord the king at *Westminster*, until———next after——— to hear their judgment of and upon the premises, for that the Court of the said lord the king now here thereof is not yet, &c.

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Leigh against Brace.

Case 128.

Hilary Term, 6. Will. 3. Roll 929.

UPON a special verdict in ejectment, the case upon the pleading was thus:

Walter Brace, being seised of the lands in question, did, on the twenty-fifth day of *July*, in the year 1622, make a feoffment

son in fee, "and for default of issue of the body of the son," to the use of the right heirs of the feoffor for ever, THE SON shall take an estate tail only under this deed.—S. C. Carth. 343. S. C. 1. Ld. Ray. 101. S. C. 3. Salk. 337. S. C. Holt, 668. S. C. 12. Mod. 101. Plowd. 541. Hob. 172. Cro. Car. 265. Cro. Jac. 290. 415. 427. 448. Lit. Rep. 253. 3. Lev. 70. 8. Mod. 23. Salk. 734. 1. Peers. Wms. 199. 432. 563. 1. Ld. Ray. 568. Cowp. 234. 410.

If a feoffment in fee be made to trustees for the use of the feoffor for life, with remainder to his

thereof

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thereof in fee to *Thomas Wilkes* and *Thomas Flavell*, and their heirs, to the use of himself for life, and after his decease to the use of his son *Thomas Brace* and his heirs for ever; and for default of issue of the body of the said *Thomas Brace*, then to the use and behoof of the right heirs of the feoffor for ever. *Walter Brace* afterwards died so seised, and *Thomas* his son entered upon the lands; who, on the sixteenth day of *April* 1681, made his will, and amongst other things devised the same to his son-in-law *John Cookes* and his heirs, on the body of *Rebecca* his then wife begotten or to be begotten, paying his debts and legacies. The said *Thomas Brace* died seised of the said lands; and after his death *John Cookes* entered by virtue of the said devise. *Samuel Brace* the defendant is son and heir of the said *Thomas Brace*, and the said *Samuel*, after the death of his father, did likewise enter upon these lands. *John Cookes* afterwards entered, and made a lease to the plaintiff for seven years, by virtue whereof he entered and was possessed until *Samuel Brace* ejected him. And the Jury make a general conclusion.

The single question was, What estate *Thomas Brace* took by this feoffment?

It was argued, That he had a *fee-simple*, for such an estate was expressly limited to him; and if the deed had gone no farther, it must be an estate in fee, and not otherwise. But that which makes the doubt are the words which immediately follow: "and for default of issue of the body of the said *Thomas Brace*, then to the grantor and his heirs." It is true, these words might create an estate-tail in a will, and alter an express limitation made of the estate before; and the reason is, because a man *in extremis* is *inops consilii*: but it is otherwise in a feoffment, which is supposed to be made upon deliberation, and with advice of Counsel. And therefore it was resolved in the case of *Dutton v. Engram* (a), that where the testator devised lands to his wife for life, and after her decease to *John* his eldest son and his heirs, upon condition that he granted an yearly rent "to *Stephen* and his heirs; and if *John* died without heirs of his body, then to *Stephen* and the heirs of his body;" that this was an estate-tail in *John*; though it was objected, that he must have an estate in fee, otherwise he could not grant the rent in fee. Now this was in the case of a will: but there is a wide difference between constructions of wills and deeds, for the latter are always taken very strictly against the grantor, and therein the first intention shall always take place; for the law will not allow any implication which can or may be made upon a subsequent clause in a deed, to alter any express estate therein limited before. As for instance: It has been ruled (b), that where a copyholder in fee surrendered "to the use of *Frances* and *John Reeve*, and the survivor; and

(a) Cro. Car. 427. 1. Roll. Abr. 342.
938.

(b) Cro. Car. 367. 2. Roll. Abr. 61.
Jones, 342.

" for

"for want of issue of the body of *John* lawfully to be begotten, "then to remain over;" with A MEMORANDUM, that the surrender was not to be in force till after the death of the surrenderor; now if this MEMORANDUM should be allowed to be good, it would have made the whole surrender void, because it had been to commence at a day to come; therefore it was held, that the surrender, being perfect in the beginning, shall not be avoided by this subsequent clause, but that *John* should have an estate for life only, which should not be enlarged by implication by a subsequent clause, either in a * surrender or conveyance, where the party might have Counsel to direct him. It is true, my LORD COKE, in his Comment upon *Littleton* (a), tells us, that "if lands are given to B. and his heirs, *habendum* to him and his heirs "if he hath heirs of his body, and if he die without heirs of his "body, that the land shall revert to the donor," this is an estate-tail, for the *habendum* shall be construed upon the whole deed to be a declaration what heirs were meant in the premises. But this was all in one sentence (b), and for that reason the estate in fee was never made perfect and absolute: it is all but one limitation, neither did it stand with any implication, as in the case at bar; and therefore it can be no authority to prove that to be an estate-tail. Neither is the *Year-Book* of *Henry the Sixth* (c) an authority to this purpose; where it is held, that if a feoffment be made to a man and his heirs, and if it should happen that he die without heirs of his body, the remainder over, that the law will intend it to be an estate-tail. It is true, the book is so, but it does not appear that it was the judgment of the Court, but only asserted by Counsel *arguendo*. But in the principal case, the estate was once made absolute; which being done, the grantor had executed his power, and could never make any farther limitation, especially it being in the case of a deed.

But on the other side it was said, that this is not an entire sentence, but it is complicated with the whole clause; that there are many forms of words to create an *estate-tail*; and though it is generally true, that the words "heirs of the body" are requisite in a gift in tail, yet general words which are equivalent will create the like estate; as for instance, lands are given to a man *et heredibus de carne sua* (d); for the makers of the statute *de Donis* (e) did not intend to enumerate all the forms of estates-tail. It is very true, such estates must be limited by express words, and it is sufficient if by words which are of the same import and signification; therefore *Littleton* (f) tells us what an estate-tail is, but does not shew what words are necessary to create such an estate. Now the subsequent words in this case do certainly make an estate-tail in the feoffee, for they shew what issue was intended to

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(a) Co. Lit. 21. a. Hob. 172.

(b) See Mr. Fonblanque's edit. of Barlowe's Equity, 445.

(c) Year Book 19. Hen. 6. pl. 74.

Plowd. 541.

(d) Co. Lit. 20. b.

(e) 13. Edw. 1. c. 1.

(f) Litt. sect. 14.

inherit,

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against
BEACE.

inherit, viz. "issue of the body of the feoffee;" and * this will be sufficient to abridge the precedent estate in fee; and if these words should not be taken in this sense, then they are vain, and to no purpose. Thus my LORD ROLLE tells us (a): If lands are given to a man and his heirs, *habendum* to him and his heirs if he shall have any heirs *de carne sua*, and if not, that it shall revert to the donor; though the first words import a fee, yet the whole make an estate-tail. Agreeable to the case at bar is that of *Watts v. Wastfield* (b), where lands were given to a man and his heirs; and if it happened that he died without "heirs of his body," remainder over; this is an estate-tail, for the limitation of the remainder over shews what heirs were intended. But *Beak's Case* (c) is in point; that was in a conveyance by way of feoffment, as this is, "to the first son who shall have issue, and to his heirs;" and for default of such issue, the remainder over;" this was held an estate-tail.

CURIA. The intention of the feoffor is plain, that an estate *in fee* should not pass to his son; for the subsequent words shew, that he intended no absolute estate should vest in him; it is no more than if a gift had been made "to a man and his heirs," viz. to the heirs of his body.

So judgment was given for the defendant.

(a) In abridging the case in the Year-Book, 27. Aff. pl. 15. 1. Roll. Abr. 838.

(b) 1. Roll. Abr. 839.

(c) Litt. Rep. 344.

Case 129.

Breedon against Gill, *Qui Tam*, &c.

Suggestion for a prohibition to be directed to commissioners of excise.

S. C. 2. Salk.

555.

S. C. 3. Ld.

Raym. 179.

ENGLAND, } BE it remembered, that on *Tuesday*, on the morrow
to wit. } of *All Souls* in this same Term, before the lord
the king at *Westminster*, cometh here in court *Robert Breedon*
in his proper person, and gives the court here to understand and
be informed, That whereas by the laws and statutes of this king-
dom of *England*, every issue joined in any cause depending in any
court of the king within this realm, before any judge or judges,
ought to be tried and determined by the testimony of *viva voce*
witnesses produced in such court, and not by the reading of notes
and minutes in writing, containing the testimony of any witness
or witnesses taken in the same or in any other court, before the
time of the trial of such issue, by any clerk of any court: and
whereas a certain information lately, to wit, on the 18th day of
January, in the 7th year of the reign of the said lord the now
king, according to the form of the statute in such case made and
provided, was exhibited at *London* in the parish of ——— in the
ward of ———, before the chief commissioners and governors of
the revenues of the said lord the king of the excise appointed, ac-
cording to the form of the statute in such case lately made and
provided, by one *Thomas Gill*, *Gent.* who sued as well for the lord
the

the king as for himself and the poor of the parish of *Saint Martin in the Fields* in the county of *Middlesex* against the said *Robert Breedon*; shewing that the said *Robert Breedon*, a common brewer, inhabiting and keeping a common brewhouse for brewing of beer and ale within the limits and jurisdiction of the general office of the excise, situate in *Broad-street, London*, that is to say, in the parish of *Saint Martin in the Fields* aforesaid, without first giving notice thereof at the said office of the excise, or to the commissioners or governors aforesaid, or to any of them within the limits and jurisdiction thereof, in and about the 16th day of *December* then last past did make use of and keep a private and concealed store-house or room for laying beer and ale, or worts in casks, the same not being such as was openly known, discovered, or made use of in his common usual brewhouse, to the damage and prejudice of the said lord the king in his revenue of the excise, which was contrary to the form of the statute in such case made and provided, and therefore he prayed the judgment of the said commissioners and governors by that information, as in and by the laws of the excise was devised and appointed; to which said information before the said commissioners and governors, the said *Robert Breedon* afterwards, to wit, on the third day of *March*, in the 8th year of the reign of the said lord the now king, there appeared and pleaded that he was not guilty of the offence in the said information contained, and issue thereupon was there joined: and in such manner it was thereupon proceeded before the said commissioners and governors of the revenue of the said lord the king of the excise, that afterwards, to wit, on the said third day of *March* in the 8th year aforesaid, there the said commissioners and governors adjudged the said *Robert* to be guilty of the premises objected to him by the information aforesaid; from which said judgment and determination, and for having relief in the premises, the aforesaid *Robert Breedon* afterwards, to wit, on the 24th day of *April*, in the 8th year of the reign of the said lord the now king, according to the form of the statute in such case lately made and provided, appealed to the commissioners of the appeals, by the laws and statutes of this realm of *England* in such case appointed; and the aforesaid *Thomas*, who sued as well for the said lord the king as for himself and the poor of the parish of *Saint Martin in the Fields* aforesaid, on the 30th day of *October* in the 8th year aforesaid, at *Westminster* in the county of *Middlesex*, before ——— *Bodington*, ——— *Lock*, and ——— *Challoner*, Esquires, commissioners of the appeals aforesaid, in due manner appointed for this purpose, according to the form of the statute in such case made and provided, to prove the said *Robert* guilty of the premises in the said information specified, offered in evidence certain notes and minutes of the evidence given by *Thomas Everard*, *John Booth*, and *Henry Caseburt*, then and now being in full life, and residing at the city of *London*, witnesses before the said chief commissioners and governors of the revenue, upon the trial of the said issue, before them then taken in writing by one *Edward Noell*,
Esq.

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Esq. clerk to the said chief commissioners and governors, without any lawful authority; and although he the said *Robert Breedon* then and there alledged and objected to the aforesaid commissioners of the appeals, that the said notes and minutes ought not by the laws to be read in evidence, and prayed that the said *Thomas Everard*, *John Booth*, and *Henry Caseburt*, being then and now in full life, as afore is set forth, might be produced to give *viva voce* evidence upon their oaths before the said commissioners of the appeals: but the said commissioners notwithstanding have adjudged that the said notes or minutes so as aforesaid by the said *Edward Noell* taken, without any lawful authority, should be read in evidence, contrary to the laws and statutes of this kingdom of *England*; the aforesaid *Thomas Gill*, the judgment so as aforesaid given by the chief commissioners and governors of the revenue of the said lord the king of the excise upon the evidence aforesaid, daily endeavours and contrives with all his power to procure to be confirmed, in contempt of the said lord the now king, and to the damage, prejudice, and manifest grievance of him the said *Robert Breedon*, and contrary to the law and custom of this kingdom of *England*; and this he is ready to verify: whereupon he the said *Robert Breedon* prays the writ of the said lord the king of prohibition in this behalf, to be directed to the said commissioners of the appeals, to prohibit them, lest they admit the notes and minutes aforesaid in evidence in the cause aforesaid.

* [272]

Case 130.

Breedon against Gill, Qui Tam, &c.

If a statute give jurisdiction to the commissioners of the excise, with an appeal from their decision to commissioners of appeal, requiring them to examine the fact
“ upon proof
“ made either
“ by confession
“ of the party,
“ or by the
“ oath of one
“ or more witnesses,” the
commissioners
of appeal must
examine witnesses *de novo*, and cannot determine

BY the statute 12. *Car.* 2. c. 23. certain impositions are given to THE KING upon *beer* and *ale* and other liquors for the increasing his majesty's revenue; and the forfeitures and offences within that act which are committed within the limits of the chief office of excise in *London*, are to be determined by the commissioners and governors of excise appointed * by the king, or the major part of them; or in case of an appeal, then by the commissioners of appeal for regulating that duty.

By 15. *Car.* 2. c. 11. an additional act made for the better collecting the said duty, and preventing the abuses therein, it was enacted, “ That no common brewer shall set up or alter any brewing vessels, without notice thereof given to the office of excise, or shall use or keep any private or concealed storehouse, cellar, or other place, for the laying any beer, ale, or worts in casks, other than which be used in his common brewhouse, and which are openly discovered or known, upon pain to forfeit fifty pounds for every tun, vat, back, copper, and cooler, set up and made use of without such notice given as aforesaid.”

termine on the evidence of the written minutes of the depositions of the witnesses examined before the commissioners of excise, if such witnesses are alive and forthcoming; and if they do, the court of king's bench will grant A PROHIBITION *quoad* the reception of such written evidence, although the statute say, “ that the judgment of the commissioners of appeal shall be final.”—S. C. 2. Salk. 555. S. C. Comb. 414. S. C. 1. Ld. Ray. 219. S. C. 3. Ray. 267. Ante, 151. 6. Com. Dig. “ Prohibition” [A. 1.], (F. 13.). 4. Bac. Abr. 251, 252.

NOTE.

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NOTE. The appellant is first to lay down the single duty of excise in the hands of the commissioners, and to give security to the commissioners of appeals for the fine and forfeiture which was adjudged against him, if the judgment should be affirmed upon the appeal, and likewise to pay double costs; but if reversed, then the informer is to pay double costs.

BREEDON
against
GILK.

The plaintiff *Breedon* suggests, for a prohibition, that by THE LAWS OF ENGLAND, when an issue is joined between the parties it ought to be tried by the evidence of witnesses *viva voce*, and not by notes or minutes of their testimony; that an information was exhibited against him before THE COMMISSIONERS OF EXCISE, setting forth, that he was a common brewer, and did keep a private storehouse without acquainting the said commissioners therewith; that he was found guilty; and that he appealed from their sentence to THE COMMISSIONERS OF APPEALS, before whom the informer produced as evidence the minutes taken before THE COMMISSIONERS OF EXCISE, and that the witnesses who gave evidence there were still alive; which minutes were allowed as evidence by THE COMMISSIONERS OF APPEALS, &c.

Show. 158. 171.
1. Sid. 65. 332.
6. Mod. 252.
Farell. 137.
143.

The question now was, Whether a prohibition should be granted, directed to them, not to admit such evidence?

THOSE WHO ARGUED for the prohibition insisted, that such evidence before THE COMMISSIONERS OF APPEALS was irregular, and that it ought not to be allowed in any court where the party may be examined *viva voce*; that the words of the statute are penned, as if on purpose to prevent such proceedings, for after the appeal is given to the party grieved, and authority to THE COMMISSIONERS OF APPEALS to determine the same, the statute requires them "to * summon the offender, and upon his appearance or contempt to examine the fact, and upon proof made, either by confession of the party or by the oath of one or more witnesses (which oath two of them have power to administer) to give sentence, and to issue out warrants to levy the forfeitures, &c." So that the statute having provided in what method THE COMMISSIONERS OF APPEALS shall proceed, and having given them power to administer an oath to the witnesses, it is plain that depositions taken before THE COMMISSIONERS OF EXCISE cannot be read as evidence before them. Besides, the reason of the thing speaks that such depositions cannot be given in evidence there, because the statute has not appointed any officer to take such minutes: neither is their clerk upon his oath: and the party can have no remedy against him if he take such minutes wrong; nor can he compel him to take them right. He cannot be compelled to put them in writing; what is done is to help his own memory; and never signed by the witnesses till of late. This is a new offence created by the statute, and a new penalty imposed, which must have been determined in the courts of common law, if the law-makers had not shewed how the proceedings should be,

Carr. 316.

* [273]

Fide Nels. Lut.
205, 206.

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against
Gill.

and what proof should be made, viz. "a voluntary confession, or
"oath of one or more witnesses," which THE COMMISSIONERS
OF APPEALS have power to administer. Now it would have been
to very little purpose to give them that power, if they might as well
admit any former depositions to be read in evidence, which indeed
can be no evidence before THE COMMISSIONERS OF EXCISE
themselves, and much less before THE COMMISSIONERS OF
APPEALS; for they are to hear the cause originally, without any
regard to what has been done by THE COMMISSIONERS OF
EXCISE. They are directed to proceed in a different manner
from the common law, by which law all examinations of fact are
to be made by witnesses and a jury. It is true, a jury is not
required in this case, but witnesses are still necessary to prove the
fact, and that upon oath *viva voce*; and the rather, because the
party may have liberty to cross-examine them. In attaints,
the witnesses are examined upon oath *de novo*, though no other
can be produced but such who gave evidence in the original cause.
So here the witnesses are examined by the COMMISSIONERS OF
EXCISE but on one side, and judgment is given by default;
therefore the party must have a right to have the witnesses
* [274] * examined *de novo* upon the appeal, especially since the cause is
now before another jurisdiction, which was created for the benefit
of the party, that he might have justice done. Besides, where-ever
an act of parliament gives an appeal, *the fact* as well as *the law* is
always examined upon the appeal. As, for instance, in the case of
bastardy, where two justices have power by the statute 18. *Eliz.*
c. 3. to make an order to charge the parents for the maintenance
of the bastard, from which order they may appeal to the sessions;
and there it is the constant practice to examine the fact again, and
not to rely upon the examination taken before the two justices.
It cannot be objected, that depositions taken in inferior courts are
transmitted both to THE DELEGATES and to THE CHANCERY,
and read and allowed there without re-examining the witnesses;
for this case is not like the proceedings in those courts, where
such depositions may be read as evidence, because the chancery is a
court by prescription and ancient usage, and there are commis-
sioners on both sides to see justice done; but a constant usage
cannot be in this case, for it is a new-created jurisdiction. The
statute 43. *Eliz.* c. 2. gives authority to two justices of peace to
determine the settlement of a poor man likely to be chargeable to
a parish; but there is an appeal given to the quarter-sessions;
but it was never known that the sessions was governed by any
notes taken by the clerks of the two justices who made the
original order. The commissioners of bankrupts are appointed by
a new law; but if bankruptcy or not should be the question at a
trial at law, the depositions taken before such commissioners shall
not be read as evidence, but the witnesses shall be examined again
viva voce.

Post. 303, 309.

THE NEXT QUESTION will be, Whether this court will now
interpose, since by the statute the judgment of THE COMMI-
SSIONERS

STONERS OF APPEALS is to be final? As to that matter, the grievance of the plaintiff begins at this court of appeals, who have proceeded in another method than what is directed by the act; and therefore the remedy is proper in this court, who are not desired to determine the cause, but only to interpose where another court uses any extravagant method, in proceeding contrary to their power. * For this court prohibits the *court of admiralty* and the *ecclesiastical courts*, even in such cases where they have an original jurisdiction, if they either deny or delay justice (a). So in suits for tithes, if any thing arise concerning the bounds of parishes, or a *modus decimandi*, they are prohibited (b). So where they deny the proof of a thing by one witness they will likewise be prohibited (c), though this court cannot examine the original cause; for it is an oppression which the common law will not allow. So if the *spiritual court* should refuse to give a copy of the libel, this court will grant a prohibition *quousque, &c.* (d). So if a *justice of peace* refuse to sign the rate for the poor (e), or if a corporation will not chuse officers, it is usual for the court of king's bench to grant a *mandamus* (f), for this is for the preservation of order and government; and such proceedings are not to take any thing from a proper jurisdiction, but to hinder them from proceeding irregularly. Now although the statute says, "that the judgment of the COMMISSIONERS OF APPEALS shall be final," and though the COMMISSIONERS OF EXCISE had a jurisdiction of the subject-matter, yet if they err in their proceeding, this Court will take notice of the whole fact, to do justice to the party injured. As if the COMMISSIONERS OF EXCISE should examine witnesses, but not upon oath, and give sentence, which is confirmed upon appeal, this court would reverse that sentence, though the statute is, "that the judgment of the commissioners of appeals shall be final."

THOSE WHO ARGUED on the other side said, that where a jurisdiction is created by act of parliament which gives an appeal, that must be the last resort; and in such case this court may command them to execute their power, but cannot reform their judgment (g). This statute gives THE COMMISSIONERS OF APPEALS power to examine witnesses, but leaves the method of such examination to themselves. Now the nature of an appeal is, that the court from whose sentence it is brought has done injustice to the party, and therefore it is very reasonable that the superior court should know upon what grounds they proceeded below; which cannot be done more effectually than by reading those very

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against
GILL:

* [275]

Carth. 33. 70.
142.
Comb. 15. 109.
462.
Fitzg. 79. 197.
Ray. 360.
2. Co. 44.
Moor, 761.

8. Mod. 335.
Fitzg. 85.

(a) Fitz. N. B. 41. 5. Co. 73.

(b) Hob. 247.

(c) Shotter v. Friend, 1. Show. 179.
353. 396.

(d) See 6. Com. Dig. "Prohibition"
(F. 15.).

(e) Yelv. 93. Circ. Car. 333.

(f) Ante, 257. 2. Salk. 428. 435.

6. Mod. 229. Comb. 422. Foley, 36.

2. Sess. Cases, 65. 3. Bac. Abr. 535.
Mr. Conft. edition of Bott's Poor Laws,

p.

(g) See Rex v. Commissioners of the
Land Tax, 1. Term Rep. 146

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Cases in Law
and Equity, 386.
Comb. 254.
Carth. 143.

depositions which were taken there. * The case now before the Court is not by reason of any complaint that some of the witnesses were not examined, or that THE COMMISSIONERS OF EXCISE refused to take their depositions, and examined only one side, for in such cases it had been proper to make application to this court; but it is to re-examine the same witnesses: and to what purpose should that be, unless to deny what they have already sworn, which would be to introduce perjury. Besides, it would tend to make the court of appeals an original jurisdiction, which is contrary to the very nature and intent of appeals; for those commissioners are not to admit any new evidence, they must take the case as it was before the commissioners of excise, and judge whether they have done right or not. To say, that orders and decrees made by commissioners of charitable uses, upon depositions taken before them, shall not be confirmed by the court of chancery upon reading those depositions, is not applicable to this case. It is true, the matter must be re-examined there, because the statute gives that court jurisdiction in those cases; for it requires such orders and decrees to be certified into that court, under the seals of the commissioners, within such times as shall be limited in their commissions, and then the chancellor is to take such order for the due execution thereof as he shall think fit. Neither can the practice of the justices of peace in the sessions upon appeals rule this case, for they have a discretionary power to examine the witnesses again *viva voce*, or take such examinations as have been made by those of the inferior jurisdictions. Nor is this case like those where prohibitions have been granted to *ecclesiastical courts*, because by bringing the appeal, you admit the jurisdiction of those courts. As for those prohibitions to *spiritual courts*, where they deny the proof of any payment by one witness, it seems to be very unreasonable, when they have an original jurisdiction of the cause, that they should not proceed in their own methods. It is true, the statute empowers them to examine witnesses upon oath, but does not say whether it shall be in writing or not. Now if THE COMMISSIONERS OF EXCISE cause such depositions to be written which have been taken before them, and transmit them to THE COMMISSIONERS OF APPEALS, that is an examination upon oath.

• [277]

Comb 203-

* It is much better for the party himself, that the depositions should be in writing; for if a witness should die before he can bring an appeal, he may have the benefit of such depositions to be read in evidence for him as well as against him. Lastly, The proceedings upon the statutes against *bankrupts* cannot be objected to this purpose, because such proceedings in inferior courts are not conclusive; but when actions are brought in this court, they must be determined according to the constant method used there. Neither does the court of king's bench send mandatory writs to others to direct them what judgment to give, but to command them to proceed according to justice. Now THE COMMISSIONERS OF APPEALS proceeded, and gave judgment in this case according to such evidence as was given below; and it is in their power,

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power, whether they will have the oath in writing or not; but it has been the constant practice to have it in writing. It must be agreed, that this act has settled no course of proceeding in this case, it has only excluded trials by jury; and where no such trials are, the fact is always determined by depositions in writing: as in chancery, there are cases of the highest nature tried by the oaths of witnesses, upon written depositions taken before an examiner in a closet.

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against
GILL.

CURIA. The common law does not require, that witnesses shall be examined *vivâ voce*, except where the trial is by jury. These depositions were taken in court, where the evidence is entered; and when that is done, the party has nothing to do but to appeal from an injury supposed to be done by an inferior court; and it is very fair to transmit that evidence which was given before them, and upon which they gave their judgment. It is true, they would have THE COMMISSIONERS OF APPEALS try the cause *de novo*, which is contrary to the very nature of an appeal. This statute directs, "that the commissioners shall proceed by the oath of witnesses, or the confession of the party." And the last resort is in THE COMMISSIONERS OF APPEALS, if they do not meddle with what is out of their jurisdiction; which is not the complaint now, but only of the course and method of the proceedings. The case of *Shetter v. Friend (a)*, which was lately adjudged in the court of king's bench, comes near this case; for there a prohibition was granted to THE CONSISTORY COURT of the *Bishop of Winton* after sentence, because they refused to allow the proof of a payment of a legacy by one witness. * But a prohibition was never yet granted to any ecclesiastical court for proceeding according to such evidence as is allowed by the common law.

Vide ante, 9.
1. Salk. 286.
275.
2. Salk. 555.

1. Show. 172.
1. Vent. 291.
Hob. 188.
Comb. 160.
Carth. 142.
Cro. Eliz. 88.
666.
Moor, 413. 9079
Hob. 247. 188.

* [278]

For which reasons nothing was done at this time.

But after, in *Easter Term*, in the ninth year of *William the Third*, upon farther consideration, a prohibition was granted *quoad* the admitting of the depositions taken in writing before the commissioners of excise, for the commissioners of appeal ought to examine the witnesses *de novo* on the appeal.

See 1. H. Bl.
Rep. 88.

(a) 1. Show. 172.

Crumwell against Grunsdale.

Case 131.

MIDDLESEX, } BE IT REMEMBERED, that heretofore, to wit, in
to wit. { Michaelmas Term last past, before the lord the
now king and the Lady Mary the late queen, at Westminster,
came George Cromwell, by Samuel Aldridge his attorney, and produces here in court then there his certain bill against John Grunsdale, administrator of goods and chattels, rights and credits, which were of Roger Urlwyn, late of Iwer, otherwise Ever, in the county of Bucks, yeoman, deceased, otherwise called Roger Urlin, of Iwer, otherwise Ever, in the county of Buckingham, yeoman, who died intestate,

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intestate, as it is said, in the custody of the marshal, &c. of a plea of debt; and there are pledges of prosecuting, to wit, *John Doe* and *Richard Roe*; which certain bill follows in these words, to wit:
 "MIDDLESEX, to wit. *George Cromwell* complains of *John Grunsdale*, administrator of all and singular the goods and chattels, rights and credits, which were of *Roger Urlwyn*, late of *Iver*, otherwise *Ever*, in the county of *Bucks*, yeoman, deceased, otherwise called *Roger Urlin*, of *Iver*, otherwise *Ever*, in the county of *Buckingham*, yeoman, who died intestate, as it is said, in the custody of the marshal of the *Marshalsea* of the lord the king and the lady the queen, being before the king and queen, of a plea that he render to him forty pounds of the lawful monies of *England*, which he from him unjustly detains, for that, to wit, that whereas the aforesaid *Roger* in his life-time, to wit, on the first day of *July*, in the year of Our Lord one thousand six hundred and seventy-four, at the parish of *Saint Clement Danes*, in the county of *Middlesex* aforesaid, by his certain writing obligatory, sealed with the seal of him the said *Roger* in his life-time, and to the court of the said lord the king and lady the queen now shewn, the date whereof is the same day and year aforesaid, acknowledged himself held and firmly bound to the aforesaid *George* in the aforesaid forty pounds by these words, *in quadranti libris*, to pay the said *George* when he might be thereunto required; yet the aforesaid *Roger* in his life-time, and the aforesaid *John* after the death of him the said *Roger*, though often required, the aforesaid forty pounds to the said *George* have not, nor has either of them, paid, but him the aforesaid *Roger* in his life-time, and the aforesaid *John* after the death of him the said *Roger*, hath hitherto wholly refused, and the aforesaid *John* doth still refuse, and unjustly detains, to the damage of him the said *George* of * twenty pounds; and therefore he brings suit, &c."

* [279]

And now here at this day, to wit, on *Wednesday* next after the Octave of *Saint Hilary*, in this same Term, until which day the said *John* had leave to imparl, and then to answer, &c. before which day the aforesaid lady *Queen Mary* *diem suum clausit extremum*, before the said lord the king at *Westminster* came as well the aforesaid *George*, by his attorney aforesaid, as the aforesaid *John*, by *Robert Stone* his attorney; and the said *John* defends the force and injury when, &c. and says, that he ought not to be charged with the debt aforesaid, because he says, that the said writing obligatory is not the deed of him the said *Roger Urlwyn*. And of this he puts himself upon the country; and the aforesaid *George* likewise. Therefore the sheriff is commanded, that he cause to come here before the lord the king at *Westminster*, on *Wednesday* next after fifteen days of *Easter*, &c. by whom, &c. and who neither, &c. to take recognition, &c. because as well, &c. The same day is given to the parties there, &c. Afterwards the process between the parties aforesaid is thereupon continued of the plea aforesaid, by

by respiting the jury thereof between them, before the lord the king at Westminster, until Friday in the morrow of the Ascension of Our Lord, unless the trusty, and well-beloved of the lord the king JOHN HOLT, Knight, Chief Justice of the said lord the king, assigned to hold pleas in the court of the said lord the king before the king himself, shall before come, on Wednesday next after fifteen days of Easter, at WESTMINSTER, in the great hall of pleas there, by force of the statutes, &c. for want of jurors, &c. At which day before, &c. sent here his record before him had in these words, to wit, AFTERWARDS, on the day and at the place within contained, before JOHN HOLT, Knight, Chief Justice of the lord the king assigned to hold pleas in the court of the said lord the king before the king himself, associated with JOHN INCE, Gentleman, by form of the statute, &c. comes the within-named GEORGE CRUMWELL, by his attorney within contained, and the within-named JOHN GRUNSDALE, although solemnly called, did not come, but made default; therefore the jury whereof mention is within-made is taken against him by default. And the jurors of that jury being called, some of them, to wit, James Parteridge, of the parish of St. Giles in the Fields, &c. came, and are sworn upon that jury; and because the rest of the jurors of the same jury did not appear, therefore others of the bye-standers, by the said sheriff of the county of Middlesex within-written being chosen for this purpose at the request of him the said GEORGE CRUMWELL, and by the command of the justices aforesaid, are newly appointed, whose names are assiled in the panel within-written, according to the form of the statute in such case lately made and provided. And the jurors so newly appointed, that is to say, John Cain and Timothy Thornbury, being called, likewise came, who being chosen, tried, and sworn to speak the truth concerning the matters within-contained, together with the other jurors aforesaid before impanelled and sworn to this purpose, say upon their oath, that one Roger Urlwyn intestate, & the said JOHN GRUNSDALE in his lifetime, together with one Anne Urlwyn, wife of the aforesaid Roger, signed and sealed, and each of them signed and sealed, as his deed, and that they delivered, and each of them delivered, to the said George Crumwell, a certain writing, in form of a writing obligatory, which certain writing follows in these words: "NOVERINT "UNIVERSI per presentes nrs ROGERUM URLWYN and ANNE "my wife, of IVER, alias EVER, in the county of Buckingham, "yeoman, teneri et firmiter obligari GEO. CRUMWELL, in "comitat. præmid. de viginti in quadranti libris bonæ et legalis "monetæ Angliæ solven. eidem GEO. CRUMWELL aut suo tertio "attorn. executoribus, administratoribus vel assign. suis, ad quænt "quidem solutionem bene et fideliter faciem, obligo me hæredes, "executores, et administratores, meos firmiter per presentes: sigillo "meo sigillas. dat. primo die Julii. anno regni REGIS CAROLI "SECUNDI, millesimo sexcentesimo septuagesimo quarta." "THE "CONDITION of this obligation is such, that if the above-named "Roger Urlwyn and my wife, his heirs, executors, administrators, "or assigns, shall pay, or cause to be paid to the abovesaid George

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POSTIA.

Tales de circum-
stantiis.

* [280]

281 122

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CRUMWELL *against* **GRUNSDALE.** "Crumwell, his heirs, executors, administrators, or assigns, the sum of twenty pounds and twelve shillings of good and lawful money of England, in and upon the twenty-fifth of December next ensuing the date hereof, at or in the dwelling-house of the above-said George Crumwell in Saxbury, that then this present obligation shall be void and of no effect, or else to remain in full force and virtue.

ROGER URLWYN,
The mark X of
ANNE URLWYN.

as by the same writing is manifest and appears. But whether, upon the whole matter aforesaid, by the jurors aforesaid in manner and form aforesaid found, the aforesaid writing obligatory, in the declaration within-mentioned, specified to be the deed of the aforesaid Roger Urlwyn, or not, the same jurors are wholly ignorant, and therefore they pray the advice and consideration of the court here. And if upon the whole matter, by the said jurors in form aforesaid found, it shall appear to the court here, that the said writing, in the declaration within-written specified, be the deed of Roger Urlwyn the intestate, then the same jurors say upon their oath, that the said writing is the deed of the aforesaid Roger Urlwyn the intestate, and then they assess damages of him George Crumwell, by occasion of the detention of the debt within-written, besides his costs and charges by him about his suit in this behalf laid out, to twelvepence, and for those costs and charges to twenty shillings. And if upon the whole matter aforesaid, by the said jurors in form aforesaid found, it shall appear to the court here, that the aforesaid writing is not the deed of the said Roger Urlwyn the intestate, then the same jurors upon their oath say, that the writing aforesaid is not the deed of the said Roger Urlwyn, as the aforesaid John Grunsdale within by pleading hath alledged. And because the court of the said lord the king now here are not yet advised what judgment to give of and upon the premises, a day is thereof given to the parties aforesaid before the lord the king at Westminster, until — day next after —, to hear their judgment of and upon the premises, for that the court of the lord the king here is not yet advised thereof, &c.

Case 132.

Crumwell against Grunsdale.

A declaration in debt on a bond for forty pounds is supported by evidence of a bond de viginti in quadrants libris.

DEBT UPON A BOND for forty pounds brought against the defendant as executor of Roger Urlwyn. The plaintiff declared, that Roger Urlwyn, otherwise Urin, in the year 1674 did, by a certain writing obligatory sealed by him, &c. become bound to the plaintiff in forty pounds by these words, "in quadrants libris."

S. C. 2. Salk. 462. S. C. 1. Ld. Ray. 335. S. C. Comb. 477. S. C. 3. Salk. 73. S. C. Holt, 121. 502. S. C. 12. Mod. 193. 2. Jones, 58. Comb. 60. 86. 137. 226. 477. 1. Carth. 204. 2. Co. 5. 3. Bat. Abr. 693. Cowp. 143.

Upon

Upon *non est factum* pleaded THE JURY found a special verdict, that Roger Urlin did sign, seal, and deliver to the plaintiff a certain writing following: "NOVERINT, &c. nos ROGERUM URLIN, &c. *teneri et firmiter obligari* GEORGIO CRUMWELL in com. prædict. *MID. de viginti in quadrants libris, &c. dat. primo die Julii, anno regni REGIS CAROLI SECUNDI, 1674.*" They find the condition of the obligation was for payment of twenty pounds twelve shillings, and that it was signed with the mark of Roger Urlwyn.

CRUMWELL
against
GRUNSDALE,

The question was, Whether the bond found by the jury will warrant that set forth in this declaration?

THOSE WHO ARGUED for it insisted,

That this was a good declaration and a good verdict. They agreed, that if the condition had been collateral, there might have been some difficulty to find out the meaning of these words in the bond; but here the bond and condition make one entire obligation, and the *viginti* shall be rejected as surplusage; for it can have no signification here, because it is not according to the condition. If so, then *quadrants* must be taken to be the word to signify the sum in which the obligor intended to be bound, and then no rule in law will be broken; for though it is an insensible word, yet the bond is good. As for instance, a man was bound in *sessanta* for *sexaginta libris*, and the bond was held good (a). So if a man be bound in *septuaginta et quinquaginta libris*, this is good for seven hundred and fifty pounds (b), though the jury did not find that the obligor intended to be bound in such a sum.

IT WAS ARGUED on the other side, that "*quadrants*;" will not answer the word "*quadraginta*;" and that in all the cases where bonds of this nature have been adjudged good, the words which denote either *tens* or *hundreds* are plain and clear. As to the case of *Parry v. Dale* (c), in my Lord Hobart, who has reported it different from all the reporters of that time; for it was, "*NOVERINT universi per presentes nos, &c. teneri, &c. in quinquagintis libris*;" this was adjudged against the plaintiff in this court, because "*quinquagintis*" was not a *Latin* word. It is true, upon a writ of error brought in the exchequer chamber, he tells us, that most of the Judges were of opinion, that it was a good bond for five hundred pounds; but no judgment was given upon the writ of error, the cause being ended by agreement: but all the other reporters of that case say, that the word ended in "*gentis*," which always signifies an hundred pounds. JUSTICE CROKE (d) tells us, that it was in *quemquegentis libris*. JUSTICE YELVERTON (e) says, it was "*in quimquegent*." And my LORD ROLLE (f), "*in quinquagintis libris*." And yet judgment was given for the defendant, because "*quimque*" or "*quemquegent*" was an insensible word, by which a man could not be bound,

(a) 2. Roll. Abr. 147. Cro. Jac. 208. Hob. 19.

(b) Hob. 116. 2. Roll. Abr. 147.

(c) Hob. 119.

(d) Cro. Jac. 146.

(e) Yelv. 65.

(f) 2. Roll. Abr. 146.

COUNSWELL
against
GREENSDALE.

So in the case of *Walter v. Pigot* (a), the "septua" for "septuaginta" had a plain signification; for "septua" is part of a good Latin word, as *septuaginta*. But *sexagint* can never be taken for *sexcenta*, for there is no such word, as it was held in the case of *Gery v. Davis* (b); and though JUSTICE CROKE has reported it (c) to be *sexagintis*, yet judgment was given for the defendant. It is true, if it had been "*sexigint*" or "*sexin-gint*" for "*sexaginta*," that is good, because those words have all the same intendment, and the *ginta* is right; but "*quadragent*" for "*quadraginta*" is wrong, and so is "*adigent*" for "*adiginta* (d)." "*Sessanta*" instead of "*sexaginta libris*" has been held good (e), because it was an Italian bond, and not intended to be put into Latin. So is "*octogesimo libris*" a good bond for eighty pounds, for it has the same signification (f).

- [284] * But the word "*quadrants*" in this case is insensible, there is no such Latin word, and so the defendant is bound in no sum at all; and if so, the plaintiff cannot have judgment upon this declaration and verdict, either as to the sum, for that is not known, nor in
- [282] what year the bond was made.

In debt on bond, if the declaration state "the date whereof" is the first of "July, in the year of Our Lord 1674," and the bond produced in evidence appears to be "dated the first of July, in the year of the reign of Charles the Second, 1674;" *quære*, If the bond being dated on an impossible day makes the variance material.

* But THE SECOND and more difficult point was concerning the date of this bond, which seemed impossible; for the year of the Lord was applied to the year of the king's reign. And as to that, there was a case relied on for this purpose (g), viz. the bond was full of false Latin, and is transcribed by YELVERTON, Justice, who was COUNSEL for the plaintiff; it was dated, *tres viginti die Octobris, anno regni reginæ domini nostri Jacobi, Dei gratia Angliæ, Scotiæ, &c. de Scotiæ sexto, de Angliæ quadragesimo secundo*, 1608; and upon demurrer the plaintiff had judgment; for in that case the parties to the bond, and the sum in which the obligor was bound, was sufficiently expressed; and though there was no such year as the forty-second year of that king's reign over England, or the sixth of Scotland, that was not held material, because a man may suggest a date where there is no date at all, if the deed be good; for the defendant must answer that, and not the date (h). The law was held to be so in the reign of Edward the Fourth (i); for then an action of debt was brought on a bond, in which the plaintiff declared for so much Flemish money, and shewed that the bond was dated 8. die Decembris, anno 78, without saying what year of the Lord, or of the king, when it ought to have been anno 1478; this was held to be a void date, and that the plaintiff might declare of what date he would since the bond delivered, and say *primo deliberat*. on such a day (k). So where debt was brought on a bond (l), dated the fifteenth of November, in the twenty-fifth

(a) Cro. Eliz. 417.

(b) 2. Roll. Abr. 147. Yelv. 105.

(c) Cro. Jac. 335.

(d) Stiles, 241. 257. 2. Roll. Ab. 147.

(e) Hob. 19. Cro. Eliz. 208.

(f) 2. Roll. Abr. 147.

(g) 1. Brownl. 110. Yelv. 193.

(h) Noy, 21.

(i) Year Book 20. Edw. 4. pl. 1. 21. Edw. 4. pl. 38. Gilb. L. E. 214.

(k) Salk. 462. 12. Mod. 193.

(l) Cro. Jac. 136. 2. Roll. Abr. 706. Stiles, 414.

of Elizabeth, and upon *non est factum* pleaded, the jury found that the bond was dated the fifteenth November, in the twenty-third of Elizabeth, but not sealed until the eighteenth of November, in the twenty-sixth of Elizabeth; and the Court was unanimously of opinion, that the verdict was well found for the plaintiff, because, upon this general issue, it appeared to be the defendant's deed, though there was a variance in the date of the bond itself upon which the plaintiff had declared. So it was held in *Goddard's Case* (a), that the date was not any part of the substance of the deed: that case was thus: *Goddard*, as administrator, brought an action of debt upon a bond against the defendant, which was made to his intestate, and dated the fourth April, in the twenty-fourth of Elizabeth; the defendant pleaded, that the intestate died before the date of that bond; and concluded his plea, that the writing *non est factum*, &c.; the jury found that the defendant did deliver it as his deed the thirtieth of July, in the year before, at which time the intestate was living, and they found the bond *in hæc verba*, but that he died before the date in April, * yet the plaintiff had judgment; for though in pleading he cannot alledge the delivery before the date, because he is estopped (that is, he is concluded to set forth the truth), yet that shall not conclude the jury to find it.

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BUT as to this it was argued, that the variance between the date of the bond as found by the jury, and the date in the bond on which the plaintiff declared, is very material; for the date in the declaration is part of the description of the bond itself; and by saying "*cujus dat. est eisdem die et anno*," the plaintiff has tied himself to that very date, and therefore it is necessary that should be found. It cannot be denied, that if he had declared on a bond bearing date such a day, and the bond had been found to be of another day, that had been void. Now this is to the same effect, for there can be no difference between *geren. dat.* and *cujus dat. est*, &c. The date of the deed which the plaintiff has set forth in his declaration is the only thing which can entitle him to an action; and if the date of the bond found vary from that date, then there is no such bond as that upon which he had declared. If a man make a feoffment in fee, dated the tenth of September (b), and the feoffee, reciting that a feoffment was made to him the eleventh September, give authority to another to receive livery and seisin for him, *secundum formam chartæ*, this is held a void feoffment, because the warrant to receive livery is by a letter of attorney, which gave him power to take it *secundum formam chartæ*, dated the eleventh September, when in truth the feoffment was made the day before; so there being no feoffment made on that day, by consequence he could not have any warrant to receive livery *secundum formam chartæ*, dated the eleventh day; therefore it was held void. As to *Goddard's Case* (c), that cannot be urged as an authority against the defendant, because the jury found the date of the bond to be according as the plaintiff had declared; for, in truth, the bond was dated the

(a) 2. Co. 5.

(b) Cro. Eliz. 603.

(c)

CEMUEL
against
GRUNSDALE.

fourth April, the twenty-fourth of Elizabeth, and the plaintiff declared upon a bond of that date, and the jury found it *in hæc verba*, though the delivery was before, viz. in the life-time of the plaintiff's intestate; but here the jury have found the date of a bond which differs from that upon which the plaintiff declared, so not like this case. * In the case of *Dodson v. Key*, which was objected out of *Yelverton (a)* on the other side, though the year of the king was mistaken, as in this case, yet the year of the Lord, 1608, was right; which was the true reason that prevailed with JUSTICE CROKE to give judgment for the plaintiff. In the case of *Lane v. Plegdall (b)* the declaration was general. But in all these cases the jury found it to be the deed of the defendant, though dated at another time; but here they have not found it to be his deed, but that he sealed *quoddam scriptum*, and so leave it to the Court to judge whether it was the same deed upon which the plaintiff had declared; so that if there be any variance between the finding of the jury and the declaration of the plaintiff, the Court cannot judge it to be the same bond.

THE COURT held the date in this case to be impossible, so it is a void date. The plaintiff has declared upon a bond *cujus dat. est* such a day, and the jury find the bond to be of an impossible date; so that the bond found by the verdict cannot be the same upon which the plaintiff had declared. And upon this exception they inclined against the plaintiff.

But adjournatur,

(a) Yelv. 193.

(b) Cro. Jac. 136.

Case 133.

Lyndsey against Sir Thomas Clerke.

The entry of a *capiatur* in ejectionment will render the record erroneous.

S. C. Salk. 54.
S. C. Carth. 390.
S. C. Comb. 387.
S. C. 12. Mod.
101.
Ante, 65. 67.
3. Lev. 401.
Run. Eject. 50.
132.

IN EJECTIONMENT there was a verdict for the plaintiff in the court of king's bench, and a writ of error brought in the house of peers.

A motion was afterwards made for the direction of the Court, Whether a *capiatur* shall be awarded against the defendant? which is usually done *ex officio* for a fine to the king for a breach of the peace.

But now by a late statute, 5. & 6. Will. 3. c. 12. it is enacted, "That no *capias pro fine* shall be prosecuted against the defendant, "either in trespass, ejectionment, assault, or false imprisonment; "in lieu whereof the plaintiff is to pay the proper officer, upon "signing the judgment, six shillings and eightpence over and "above the usual fees." So that now it will be error to have a *capias* awarded, since the act prohibits its execution by remitting the fine.

THE COURT, therefore, was of opinion, that the *capias* should be wholly omitted.

Blackwell

* Blackwell against Eales.

Case 134.

IN trespasss, assault, and false imprisonment, the plaintiff declared, that the defendant, "on the first day of *February*, in the eighth year of the reign of the lord *William the Third*, now King of *England, &c.* with force and arms, &c."

The alledging of the *trespass* in a declaration of assault and false imprisonment, on an impossible day, or on a day subsequent to the trial, is aided by the verdict.

Upon *not guilty* pleaded, the plaintiff had a verdict; and THE POSTEA being stayed, the question was, Whether the plaintiff should have his judgment? for the declaration was of *Easter Term* last, and he had declared of a trespass on the first day of *February*, in the eighth year of *William the Third*, which time was not yet come.

S. C. 2. Salk. 662.
S. C. 3. Salk. 3. S. C. Carth. 389.
S. C. 12. Mod. 102.
S. C. Comy. Rep. 12.
Hob. 189.
Cro. Jac. 626.
Cro. Eliz. 97.
377.
Yelv. 94.
Burnb. 223.
Salk. 561.
Stra. 232. 249.
1095.
3. Burr. 1729.
1. Bac. Abr. 192.
5. Bac. Abr. 317.
5. Com. Dig. "Pleader" (C. 19.).
5. Bac. Abr. 214. 317.
Bull. N. P. 86.
Dougl. 681.

IT WAS ARGUED for the judgment, that an impossible time is no time at all, and that this mistake shall be helped by the verdict; that the plaintiff could never have had a verdict, unless the trespass had been proved to have been done before the bill filed; and that he could give nothing in evidence after the action brought. So where the plaintiff declared (a), that the defendant returned him in such a parish, *quod aptaret et conficeret* a suit of clothes for him, and does not shew the day or place, this was held good after a verdict.

3. Burr. 1729.
1. Bac. Abr. 192.
5. Bac. Abr. 317.
5. Com. Dig. "Pleader" (C. 19.).
5. Bac. Abr. 214. 317.
Bull. N. P. 86.
Dougl. 681.

But on the other side it was said, that the plaintiff could not have judgment in this case: for as it is certainly true, that he should never recover where the cause of action appears to be after the suit commenced, so the reason is the same where the day is not come at the time of the judgment given, as where the cause appears to be after the action commenced; and the reason why it is erroneous is, because the plaintiff had sued, when it appears he had no cause for such suit. When the defendant had pleaded "not guilty," he then denies the charge in the declaration, and it is impossible that the jury should find him guilty of a fact which never was committed; therefore it must certainly be wrong to give a judgment for that which, upon the face of the record, appears to be impossible. The want of alledging a place cannot be helped even after a verdict; as in an action on the case in nature of a conspiracy brought against two (b), setting forth, that they were joint merchants of a stock of wares, and did not shew where, the plaintiff had judgment; but it was reversed in the exchequer-chamber for that very reason. Now if the want of alledging a place is not helped after a verdict, no reason can be given why want of time should. The case of *Hambleton v. Veer* (c) is an express authority that the plaintiff cannot recover damages for a time to come after the action brought: it was an action on the case, wherein the plaintiff declared, that one *Veer* became his apprentice on the twenty-ninth of *September*, in the sixteenth year of

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(a) Cro Jac. 626.

2. Keb. 693. 697.—See also Comy.

(b) 1. Leon. 75. Moor, 188.

Rep. 232.

(c) 1. Lev. 299; 2. Saund. 169.

Charles

BLACKWELL
against
EALES.

Charles the Second, and was to serve him nine years; that he served him five years; and the defendant on the last day of *October*, in the twenty-first year of *Charles the Second*, had procured the said apprentice to depart out of his service, *per quod* the plaintiff lost the profit of his servant *per totum residuum termini præd. ventur.*; and it was adjudged, that the plaintiff could not recover damages for so much of the term which was to come. It is true, that too much time was laid in that declaration; and the reason why the plaintiff could not recover damages was, because the apprentice might return. But in this case the jury could not have any consideration of a time which was not come. As to the objection, that an *impossible time* is no time, and if so, the want of alledging a time is helped after verdict, that may be true, and yet not to this purpose, because here is a certain time set forth in the declaration, which will come. *Time and place* are such material circumstances, that they require certainty in a declaration, and some day must be laid before the action brought, which is not done here; for to make this to be in the eighth year of *King William*, you must reject twenty days, which will never be allowed.

Dougl. 631.

CURIA. There must be evidence given of a fact done before the action brought; the time is but a circumstance of a thing done; for when by a traverse it is made part of the issue, such traverse is never good.

So the plaintiff had judgment.

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Case 135.

The King against Keat.

Counsel assigned, on the prayer of a prisoner, to argue a special verdict on an indictment for murder at common law, and on the statute 3. Jac. 1. c. 8.

S. C. 1. Salk. 47.
S. C. Comb. 406.
S. C. Skin. 666.
S. C. 12. Mod. 118.
S. C. Holt, 481.
S. C. 3. Salk. 191.
3. Bac. Abr. 367.
Kely.

THE DEFENDANT was indicted at the last assizes, both at common law, and upon the statute of *Stabbing (a)*, for the murder of one *James Wells*; which indictment being tried before **HOLT, Chief Justice**, the jury gave a special verdict to this effect:

Before the said fact committed, *viz.* the fifteenth of *June 1696* the defendant retained the said *James Wells* to * serve him as a gardener, and being in a little room near the kitchen, he sent to the said *Wells* to deliver the key of the garden to the defendant, which he refused to send. One *Henry Phillips*, who was the person sent to demand the key, returned, and told the defendant that *Wells* refused to deliver it. The defendant immediately went into another room and fetched his sword, and came to *Wells*, and expostulated with him about the delivery of the key. *Wells* told the defendant, that he might have it if he would: thereupon the defendant struck him on the head with his sword, and *Wells* having a snead of a scythe in his hand struck at the defendant; but the force of the intended

(a) 3. Jac. 1. c. 8.

Michaelmas Term, 3. Will. 3. In B. R.

blow was prevented by the rack in the kitchen, in which the scythe stuck. Afterwards *Wells* thrust at the defendant several times, and thereupon the defendant killed him with the sword.

THE KING
against
RIAT.

The question was, Whether this was murder or not?

The defendant being at bar, desired that SIR BARTHOLOMEW SHOWER and MR. EYRE might be his Counsel, which was granted; and MR. COWPER was assigned by the Court to be of Counsel for the king.

Then they moved that he might be bailed, being a gentleman of quality; which was denied by the Court, as it was in *Buckner's Case (a)*, HOLT, Chief Justice, affirming, that the Court could not bail in manslaughter till after the party had his clergy allowed.

The king's bench will not bail in manslaughter till clergy allowed. Post. 455.

1. Salk. 103. Skin. 833. 2. Vent. 93. Comb. 111. 298. Stiles, 467.

* [289]

In the *Hilary Term* ensuing it was argued for THE KING, that this was murder, and that for two reasons, though there was no express malice found.

FIRST, Because the defendant was doing an unlawful act when the death of the party ensued.

SECONDLY, The deceased was killed without any provocation.

And in both these cases the law implies malice.

FIRST POINT. The defendant was doing an unlawful act, which was, in correcting his servant with a sword drawn, a very improper instrument for that purpose; and death thereupon ensuing, the law will imply malice from the nature and manner of doing it to make the act murder (b). * My Lord Coke (c) mentions several cases which have been adjudged murder, where death immediately follows the doing an unlawful act; as in stealing deer in a park, and the thief shooting at the deer and killing a boy in a bush (d); so the shooting at a cock or hen, or any other tame thing in which one has a property, and a man is killed, this is murder, because the act was unlawful (e). There could be no malice in those cases either against the man or the boy, for the defendants were not acquainted with them; but the facts being unlawful, the law couples the event to the causes, and so implies malice to make it murder. Nay, Lord Coke (f) goes a little farther; for he tells us, that if death ensue an act done with an ill intent, though that intent extend not to death, and though the criminal did not know the party slain, yet it is murder. And he

A master, on his servant refusing to deliver the key of the garden, goes into an adjoining room, fetches his sword, returns and ex- postulates with his servant, and on receiving a provoking answer strikes him on the head with his sword. The servant aims a blow at the head of his master with a scythe which he had accidentally in his hand, but misses him; and the master, on the servant's continuing to thrust at him several times with the scythe, killed the servant with the sword—Quare, If this be man-

slaughter or murder.—S. C. Comb. 406. Jones, 340. Godb. 154. Kellw. 1136. Kely. 65. 1. Hale, 454. 473. Foster, 262. 1. Hawk. P. C. ch. 29. f. 5, 9. Cowp. 832. 3. Bac. Abr. 567. 671. 4. Bl. Com. 176.

(a) Stiles, 467.

(b) 3. Inst. 51. Hale P. C. 44.

(c) 3. Inst. 56.

(d)

(e)

(f) 3. Inst. 57.

gives

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gives an instance of a man throwing a stone over a wall amongst a multitude of people, which he knew were coming from church, with an intention only to fright them, and one is killed, this is murder (a). This is applicable to the case at bar ; for the defendant might not intend to kill his servant when he first corrected him with a sword ; but that being a very improper instrument for correction, shews that he had some ill intent ; and death ensuing, it is murder. Agreeable to this was the resolution formerly in the king's bench, in the case of *Rex v. Wormald and Others* (b), in the eighteenth year of *James the First* : they entered *Hyde Park*, and one *Hillock* and others, who were servants to the keeper, commanded them to stand, which they refused, but fled ; thereupon one of the servants shot at them, and wounded one ; then they all turned back, and one of them killed *Hillock*, for which they were all indicted for murder *ex malitiâ præcogitatâ*, and were convicted ; for though there was no malice to the party slain, yet they all coming into the park with an ill intent, and to do some unlawful act, and death ensuing, the law implies malice. The like indictment was against my *Lord Dacres* and others (c) for the like offence, for which they were convicted and executed. Now all these cases extend to make that murder by implication of malice prepensed where death ensues by the means of doing some unlawful act by the person killing, though death was not at first intended by him (d). But there is yet a stronger case where, by the opinion of ALL THE JUDGES OF ENGLAND, it was ruled murder in the keeper of a park for killing another, though the person killed was at * that time doing an unlawful act himself : and this was *Holloway's Case* (e), which was thus : A boy climbed a tree in *Austerley Park* to cut boughs, and *Holloway* the woodward commanded him to come down, which he did ; he then tied him with a rope to a horse's tail, and struck both the boy and the horse, which running away with the boy, thus tied, broke his shoulder, and thereupon he immediately died ; and this was adjudged murder, though *Holloway* had no intention to kill the boy ; but being killed without making any resistance, by one who had no authority to correct him in that manner, and though the person thus killed was doing an unlawful act in cutting the boughs, the law implies that malice was prepensed, which was the reason of that judgment. Now the most favourable thing which can be said for the defendant *Keat* is, that his servant sent him a saucy answer, for which he might have corrected him ; but then it must be done with a fit and proper instrument, and not with a sword. It is not a material objection to say, that because he had no intention to kill his servant, therefore it cannot be murder ; for in *Holloway's Case*, before-mentioned, he had no intention to kill the boy, yet that was held murder. The law was the same in the eleventh year of *Henry the Seventh* (f), when *FINEUX*, *Chief Justice*, gave the rule, " That if two be playing at sword and buckler by

1. Hale P. C.
37. 440. 472.

(a)

(b) 2. Roll. Rep. 120. S. C. Palm. 35.

(c) Moor, 36.

(d) 1. Hawk. P. C. ch. 31. sect. 46.

(e) Cro. Car. 131. S. C. Palm. 547.

S. C. Jones, 198.—See Foster, 292.

1. Hale P. C. 454. 4. Bl. Com. 199.

(f) Year Book 21. Hen. 7. pl. 14.

" consent,

it consent, and one kill the other, it is felony," because such plays are unlawful; and yet there is no intention of killing. So in this case, the first act of beating the servant with a sword was unlawful; and it has been constantly ruled, that where death ensues an unlawful act it is murder; for it cannot be intended in this case, that the master thrust at his servant with a sword *animo corrigendi*. So it is where *A.* meets *B.* in the street and cudgels him, and *B.* draws his sword, and then *A.* kills him; it is murder (*a*); for the first act of beating him was unlawful, and the ill event shall be coupled to the first act.

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against
KEAT.

SECOND POINT. The deceased was killed without any provocation; and in such cases likewise the law supplies malice prepened. The pushing the prisoner with the sned of the scythe cannot be a provocation to justify this fact, because it was in defence of his person; it was subsequent to the fact begun by the master, which was unlawful, *viz.* the striking the servant with a sword; for which reasons this must be murder.

* THOSE WHO ARGUED for the defendant, began with the definition of MURDER, which, in the old books, is defined to be "*occulta hominis occisio*;" and the reason of it was, because in former ages, when the Danes and the Normans inhabited here, the malice between them and the Englishmen was so great, that if any person was killed, and it was not known by whom, the murderer was taken to be either a Dane or a Norman, unless there was plain proof that it was done by an Englishman. It has now another definition; for "MURDER is where a man of sound mind and memory unlawfully kills a reasonable creature in *rerum naturâ* under the king's peace with malice forethought, either expressed by the party, or implied by the law, so as he die within a year and a day after the fact (*b*)."
MALICE must therefore be the foundation of murder, both at common law and upon the statute of stabbing; and such malice, my Lord Coke (*c*) tells us, is "the compassing to kill, wound, or beat another *sedato animo*;" so that if there be any sudden occasion of heat or quarrel amongst men, and they immediately fetch their swords and go into the field to fight, and one is killed, this is not murder, because it was not *sedato animo*, without which there can be no malice, and consequently no murder. The law of God admits of this distinction, and has in some measure dispensed with the Sixth Commandment, by which we are forbidden to kill: for God commanded the children of Israel, when they divided the land of Canaan, to give the Levites six cities of refuge, and to appoint some such cities for themselves, that the slayer might fly thither who killed another unawares (*d*), that is, without malice; and this was to preserve himself from the next kinsman, who had power to put him to death: but his power did not extend to take vengeance on him

* [291]

1. Hawk. P. C.
c. 31. f. 9.

(a) 1. Sid. 277.

(b) 3. Inst. 47.

(c) 3. Inst. 51.

(d) The Book of Numbers, chap. xxxv.

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who killed another without any malice; and therefore this remedy was provided, lest he should destroy him in his rage. But if he smote the deceased with an instrument of iron, that is, purposely or wilfully to kill him, or with throwing a stone which might probably kill him, or with a hard weapon of wood, or if he thrust him out of hatred, which must be malice forethought, or smote him in enmity, so that he died; in all these cases it was murder. So that if the man-slayer was not in enmity with the person slain, or did not seek his harm, then the magistrates of the city were to give judgment between him and the next kinsman, and to deliver him to the city of refuge whither he fled, where he was to be confined till the coming of the high priest. It is plain, therefore, that if there was no malice in the slayer against the person slain, he was not to be punished as a murderer by the law of God. Sanctuaries were also allowed here in *England* formerly; but they were taken away by the statute 23. *Hen. 8. c. 1.* which likewise takes away the benefit of clergy from those who shall commit wilful murder of malice prepensed. And another statute, 1. *Edw. 6. c. 12.* provides, that in other cases, that is to say, if there be no malice prepensed, the party shall have the benefit of clergy, and the privilege of sanctuary. To apply this to the present case: there is no express malice found; so that if there were any, it must be implied by law either for killing the servant in pursuance of an unlawful act begun by the master, or by killing him without any manner of provocation, as it has been argued against the prisoner. The malice cannot be implied in this case for killing the servant in pursuance of an unlawful act. My Lord Coke (a) has put the case so generally as to the unlawfulness of the act, that little can be collected from it: he tells us, that if the first act be unlawful, and death ensue, it is murder. It is true, he instances in a man intending to steal a deer in a park, and shooting at the deer, he kills a boy hid in a bush; this he says is murder, though he had no intent to hurt the boy, because the first act was unlawful: so likewise in the case of throwing a stone over a wall and killing another, which has been observed on the other side; this is murder, because the law implies malice. But my Lord Hale (b) was of another opinion, for he tells us, that if the unlawful act want deliberation, or if no personal hurt was intended to another, it is no more than man-slaughter. Besides, that intent must extend to death; for if it be only to commit a trespass, or to beat a man, and death ensue, that will not make it murder. Therefore my Lord Coke distinguishes with too much nicety upon the life of a man, and directly contrary to the *Levitical law*, and it is not warranted by the authorities which he has cited in the margin of his Third Institutes; which are these: * The first is in the reign of *Henry the Fourth (c)*, which is no more than the opinion of the Court, that if a man kill another by mis-

1. Hawk. P. C.
6. 72. f. 22.

* [293]

(a) 3. Inst. 56.
(b) 1. Hale, 44. 57. Yelv. 205.

(c) Year Book, 1. Hen. 4. pl. 18.

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fortune he shall forfeit his goods, but shall have his pardon *ex gratia*: now this is rather an authority for the prisoner, than against him. The other case was in the reign of Henry the Seventh (a), where, by the opinion of FINEUX, Chief Justice, it is held, that if two play at sword and buckler by the command of the king, and one is killed, it is not felony; but if the king had not commanded it, it is otherwise; for though such games are suffered, they are not lawful; which is as much as to say, that the king may tolerate what is unlawful, and that is not to be presumed. The same Chief Justice was of opinion, that if a man throw a stone over a house and kill another, it is not felony; which is denied by Brooke in abridging the case (b), so that it is but one Judge's opinion against another: besides, FINEUX does not say it is murder, but only felony; neither does he mention whether that felony is without the benefit of clergy. And my Lord Coke (c) himself gives some instances where death ensues an unlawful act, and yet it is not murder: as if two men fall out, and presently fetch their swords and go into the field and fight a duel, and one is killed, it is not murder, because there was no malice prepen- sed (d). Now it cannot be denied, but that it is an unlawful act to fight a duel (e), and yet he was of opinion, that this was not murder. Those cases of shooting at a deer and killing a man are not applicable to this fact; for the act of shooting was not only unlawful, but it was voluntary, and the immediate cause of death: so likewise was the throwing a stone; for though no malice was intended to the person slain, yet it is plain that the slayer did not value who was killed. Therefore great care ought to be taken to distinguish rightly in such cases where the life of a man is concerned. For my Lord Coke's distinction is too narrow, in saying, that "it is murder if death ensue an unlawful act," because the act must not be only unlawful, but voluntary. If a man should climb an apple-tree to steal the fruit, and fall down by misfortune upon the head of another under the tree, and kill him without hurting himself, this is not murder, and yet no man will deny but stealing the apples was an unlawful act, and death did ensue that act; but the fall which was the cause of it was involuntary, and therefore it is not murder. * It is likewise to be considered, whether the act is done *sedato animo*, or in passion; for if in passion, it is not material who was the aggressor: as for instance: If there be malice between A. and B. and they fight, and A. is killed, it is murder in B. though A. gave the first blow; so if he had assaulted B. and then fled to a wall, and in his own defence had killed him: though it is questioned by my Lord Hale (f), whether this is murder or not. But both these cases are put, where the malice was prepen- sed, for it is that which is the material matter to make it murder, and not by whom the first

1. Hawk. P. C.
c. 31. f. 21.

1. Hale's Pleas
of the Crown,
426. 477.

* [29+]

(a) Year Book, 11. Hen. 7. pl. 23. a.

(b) Bro. Abr. "Corone," pl. 228.

(c) 3. Inst. 51.

(d)

(e) 1. Hawk. P. C.

(f) Hale's Summary, 47. 1. Hale's
P. C. 466.

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1. Hawk. P. C.
c. 31. f. 27.

stroke was given. The case in *Croke* (a) is much stronger than this now at bar. Two boys were fighting in a field; one beat the other so that his nose bled; the boy went home to his father, being a mile distant from the place where they fought, and complained to him; who immediately came into the field where the other boy was, and after some foul language struck him with a cudgel, of which stroke he died; this was adjudged *manslaughter* only, because it was upon a sudden occasion; the father was provoked by seeing his son's blood, and no precedent malice in him; and though it was at the distance of a mile, yet it was but one continued passion, and the first heat of blood not cooled. This was a case which my *Lord Hale* (b) put for law; and yet it was as unlawful for the father, upon such a provocation, to correct that boy, as it was for the prisoner to beat his servant. The case of *Rex v. Wormall* (c) mentioned on the other side, is not like this; because he and his companions came with a malicious intent to rob the park, and either to maintain their purpose or kill the opposers. And as for *Holloway's Case* (d), the act was so barbarous, that it could not be found otherwise than murder; for the boy who was killed gave the keeper no manner of provocation, but submitted himself to his mercy, and he turned him over to the mercy of his horse.

1. Hawk. P. C.
c. 29. f. 5.

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SECOND POINT. Malice cannot be implied in this case by killing the servant without any provocation, because there was undutiful and irreverent language given by him to his master. It is true, this is not such a provocation which will justify the master in cutting his servant on the head with a sword, much less for killing him; but still it is a provocation, and the books mention, *that the law implies malice where a man is killed without any provocation, which is not this case, for there was a provocation (e). A butcher and others quarrelled, and in the affray the butcher was hurt; one of the persons in that former quarrel came by his shop three days afterwards, and made a wry mouth at him; upon which he came out of his shop and cut him on the calf of his leg with a sword, whereof he instantly died (f). Now here being a former quarrel, which had continued three days, the Court, upon the whole matter, directed this to be found murder; but if there had been no precedent quarrel, and the wound had been given upon a sudden provocation, by making a wry mouth, without any intention of killing at that time, it had been otherwise.

Fost. 301.
4. Black. Com.
193.

CURIA. It was justifiable in the servant to use the sned of the scythe after a cut made on his head by his master. The provocation given to him was very slender, and may be esteemed as

(a) Cro Jac. 296.
(b) Hale's Summary, 42.
(c)

(d)
(e) 9. Co. 67.
(f) Cro. Eliz. 694 778. Noy, 171.

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none at all, because, after the answer sent by the servant, the prisoner expostulated with him for some time.

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Sed adjournatur (a).

(a) HOLT, Chief Justice, was clearly of opinion that this was murder at the common law, the refusing to send the key not being a sufficient provocation to extenuate the act to manslaughter; and cited the case of *Rex v. Grey*, Kely. 87. See also 2. Ld. Ray. 1493. Foster, 291. 1. Hawk. P. C. ch. 31. f. 32. But he thought that it was not within the 1. Jac. 1. c. 3. for the sword was clearly a weapon drawn within the meaning of the statute. S. C.

Skin. 666. But because ROXBY, Justice, conceived that it was not clearly found by the verdict that the stroke with the sword by the prisoner was given before the thrust with the sword by the deceased, S. C. Comb. 409. the matter was adjourned, S. C. Holt, 481. And afterwards both the indictments were quashed for defects of form, and the prisoner discharged on bail. S. C. 12. Mod. 113. S. C. 3. Salk. 191.

Swinfield against Lydall.

Trinity Term, 8. Will. 3. Roll 229.

Case 136.

AN action of trespass and false imprisonment was brought for detaining the plaintiff in custody until he had paid eleven shillings for his deliverance.

A plea in justification to false imprisonment for detaining the plaintiff until he paid eleven shillings is good, although it do not go to the whole sum.

The defendant pleads the jurisdiction of the court of conscience in London; that they had power to make orders and exact obedience to them; that an order was made by that court for the plaintiff to pay ten shillings and four-pence, &c. which he not performing, the defendant took him by virtue of a precept of that court; and so justifies the imprisonment, and detaining him till he had paid that sum.

S. C. 1. Salk. 408.
S. C. 3. Salk. 219.
S. C. Skin. 664.
1. Roll. Rep. 265.
Moer, 704.
Cro. Eliz. 667.
2. Saund. 5.

To this plea the plaintiff demurred, because the justification did not go to the whole sum of eleven shillings, but only to ten shillings and four-pence.

To which it was answered, that the sum was no part of the trespass, but only an aggravation of the damages; that the imprisonment was justified, which in this case is sufficient, so that the defendant could not be punished for false imprisonment, though he might for extortion; but that must be by another action. * As for instance: In an action of assault and battery (a), and false imprisonment, at *Charlton*, till he had paid twenty-eight pounds, the defendant pleaded *not guilty* as to all except the imprisonment; and as to that, he justified by a process out of the court of *stannaries*, by virtue whereof he took the plaintiff, and detained him till he paid the money; and upon demurrer to this plea, one exception was, that the defendant having pleaded *not guilty* as to all except the imprisonment, he must of consequence be *guilty* as to the taking the twenty-eight pounds, and then the justification of the

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(a) Eveley v. Stoley, 1. Roll. Rep. 264.

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imprisonment till he had paid the twenty-eight pounds, is repugnant in itself, so that he ought to have made a particular answer to the payment of the twenty-eight pounds; but the Court was of another opinion, because, having answered the imprisonment, that shall be a good answer likewise to the payment of the money, for that takes in the whole substance of the action. So that this plea is good, though it do not come up to the whole sum; for if he had said nothing to it, yet his plea had been good.

A justification under an order of the sheriff's court must shew that the party was taken to the comptor.

ANOTHER EXCEPTION was, that the defendant did not set forth that he took the plaintiff to carry him to THE COMPTER.

The answer was, That it is sufficient to say, that he took him *virtute præcepti*. It is true, by law, the defendant ought to have carried him to prison, but he may keep him a reasonable time in his custody till he can find bail, and it is not false imprisonment, though he do not immediately carry the prisoner to gaol (a).

Cro. Eliz. 404.
T. Jones, 97.
2. Show. 87.
139.
12. Mod. 230.
Lutw. 589.
Gilb. Execut. 16.

CURIA. This is a special authority given by act of parliament to this court of conscience to commit, &c. (b) but the officer is not to detain the person in custody till the money is paid to him; for neither he nor the sheriff should receive it, unless it is upon a *seri facias*.

And afterwards, in Hilary Term, for this reason, JUDGMENT was given for the plaintiff.

(a) But see the 2. Geo. 2. c. 22.

(b) 3. Jac. 1. c. 15.

* [297]

Cafe 137.

* The King *against* the Bishop of Chester, Peirce, and Cook.

S. C. 2. Salk. 560.
S. C. 3. Salk. 24.
40.
S. C. 12. Mod.
185.
S. C. Show. P.
C. 212.
S. C. Skin. 651.
S. C. 1. Ld.
Ray. 292.
Post. 335.
2. And. 32.
3. Lev. 377.
Moor. 413.
Hob. 224. 230.
2. And. 32. 36.
154.
4. Mod. 200.

THIS was a writ of error to remove a record of *quare impedit* brought against the Bishop of Chester, and Richard Peirce, and Richard Cook, for hindering the plaintiff to present to the church of Bedall, setting forth, that Queen Elizabeth, on the twelfth of February, in the twelfth year of her reign, was seised of the advowson of Bedall in fee *ut de uno grosso*, and, being so seised, she presented thereunto one John Tymms, PROUT by the enrollment of such presentation in the court of chancery, and there remaining, it does appear; that Tymms was instituted and inducted; and that after the death of the queen the said advowson descended to KING JAMES; that the church being void upon the death of Tymms the king presented Dr. Wilson, and afterwards died seised, and the said advowson descended to KING CHARLES THE FIRST; that upon the death of Dr. Wilson that king presented Dr. Wickham, who was instituted and inducted, and died; that upon the death of Dr. Wickham one John Peirce, the father of Richard Peirce the now defendant, presented William Metcalfe by usurpation, who was likewise instituted and inducted; that upon the demise of that king the said advowson descended to KING CHARLES

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CHARLES THE SECOND, who on the twenty-eighth of *August*, in the first year of his reign, presented one *Peter Samwales* upon the death of the said *Metcalf*; that the said advowson afterwards descended to KING JAMES THE SECOND, upon whose abdication it came to KING WILLIAM and QUEEN MARY; that the church became void by the death of *Samwales*, so that it belonged to them to present, who were hindered by the defendants.

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THE BISHOP pleaded, that he claimed nothing but as ordinary; upon which there was judgment against him in common form.

The other defendant *Richard Peirce* pleads, that *bono et verum est* that KING CHARLES THE FIRST was seised of this advowson, *de uno grosso ut de feodo*, *PROUT* in the declaration, and that he presented *Dr. Wickham*, who was instituted, &c. but farther says, that the said king, being so seised, did by letters patents dated the nineteenth of *July*, in the fourteenth year of his reign, grant the same to *William Feekstone*, *tunc ARMIGERO postea MILITI*, and to his heirs; * that *John Peirce*, by usurpation, presented the said *Metcalf*, and that *Sir William Feekstone* released the said advowson to *Peirce* and his heirs, who thereupon became seised in fee, and died so seised; that the said advowson descended to the defendant *Richard Peirce*; that the church became void upon the death of *Metcalf*, and that afterwards KING CHARLES THE SECOND presented the said *Samwales* by lapse, who died; so that now it belonged to him the said *Richard Peirce* to present, and traversed that KING CHARLES THE FIRST died seised *modo et forma*.

* [298]

The other defendant, *Cook*, pleads the like plea by way of excuse (for he could not plead to the right of the advowson); and that *Richard Peirce* presented him.

THE ATTORNEY GENERAL demands *oyer* of the letters patents of KING CHARLES THE FIRST, which are entered in *hac verba*, reciting that QUEEN ELIZABETH granted to the *Earl of Warwick*, and his heirs, the manor of *Bedall*, and the advowson thereunto appendant, *HABENDUM*, &c. *in capite* by the fortieth part of a knight's fee, which rent descended to KING JAMES, who on the eighteenth of *August*, in the seventh year of his reign, granted the same to *Sir Christopher Hatton* and his heirs; and that the advowson did afterwards come to *Sir William Feekstone* and his heirs, to whom the king did ratify and confirm the same. In which grant there is another recital and clause confirming all that was granted by QUEEN ELIZABETH and KING JAMES; and that *Sir William Feekstone*, by virtue of that grant, claimed the said advowson; that upon a vacancy by the death of one *Petty* KING JAMES presented *Dr. Wilson* by lapse; and after his death KING CHARLES presented *Dr. Wickham*, against whom *Sir William Feekstone* brought a *quare impedit*; that being at issue, an agreement was made, that *Dr. Wickham* should hold the living during his life. Then follow these words: "KNOW YE THEREFORE, that we *ex ulteriori gratia nostra concedimus* WILLIELMO
T 4 "FEKSTONE,

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"FEEKSTONE, *militi, advocacionem, donationem, et liberam disposi-
tionem ecclesie de BEDALL quando et quomodo* it should become
"void, HABENDUM to him, his heirs, and assigns," under whom
Peirce the now defendant claimed,

This being the case upon the *letters patents* and the pleadings,
there was a demurrer to this plea, and JUDGMENT given in
the common pleas that the grant made by KING CHARLES THE
FIRST was a void grant, because it was of this advowson as *ap-
pendant* to the manor of *Bedall*, when it was an advowson *in gross*;
and if so, the defendants have not well induced the traverse;

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Carth. 321.

* IT WAS NOW ARGUED *for the defendants*, that the letters
patents were good; for admitting that this advowson was granted
by THE QUEEN to the *Earl of Warwick* as *appendant* to the ma-
nor, when it was *in gross*, it does not therefore follow that KING
CHARLES, reciting that void grant in his letters patents, can give
no title to *Sir William Peekstone*; for every mistake or misappre-
hension in letters patents will not make them void: as for instance,
if the king should be mistaken in the law when he is truly in-
formed of the fact, that will not make his grant void. But it does
not appear that THE QUEEN was mistaken in her grant, for she
was not only seised of this advowson, but of the manor of *Bedall*
by the death of one *Simon Digby*; then she granted it as an ad-
vowson *appendant*, and KING CHARLES THE FIRST granted it
as such. Therefore it must be a very immaterial allegation at
this time to say that it was *in gross*, especially since it tends to
vitiate two royal grants, one of them being made above one hun-
dred and twenty years since: so that though THE QUEEN might
be mistaken then, yet that mistake shall not turn to the prejudice
of the defendant's title now, because of the length of time; for
they cannot take issue upon it, whether *appendant* or not, or tra-
verse that it was an advowson *in gross*. Neither does THE AT-
TORNEY GENERAL rely upon this wholly as his title, but he
goes on and lays a seisin in KING JAMES and KING CHARLES;
he might have begun it in either of those kings, which would
have been good to revest the advowson in the crown; and there
was no necessity to resort to the seisin of the queen, for it is not
material whether she was seised of this advowson *in gross* or not,
or whether she was seised at all, because the defendant could not
take issue upon it, or traverse it: so that it being not material to
their title, and they having no way to come at it in pleading, this
Court will not take notice of it; or if it do, the Judges will
expect a very clear evidence that it was an advowson *in gross* in
the queen, before they will avoid those letters patents by a sug-
gestion that it was not. It is plain, that the queen granted the
advowson to the *Earl of Warwick*, and whether *appendant* or not,
is but *surplusage*, and need not be set forth: as where the de-
mandant brought A FORMEDON *in descender* (a) upon the grant

(a) Year Book, 9. Hen. 4. pl. 39. 14. Hen. 4. pl. 31.

of a reversion to two by fine, the remainder to his ancestor who was seised, &c. the tenant would have taken advantage that there was no such fine, but the Court would not admit it, because the mentioning a fine was but surplusage; for A FORMEDON in descender may be maintained without deed or fine. * So where the defendant pleaded to an information of intrusion (a), that, before that time, ANNE Countess of Warwick was seised in fee, and that she, in the third year of Henry the Seventh, levied a fine to him, and the heirs males of his body, the reversion to the Countess and her heirs, after whose death it descended to EDWARD Earl of Warwick, her cousin and heir, who, in the nineteenth year of Henry the Seventh, was attainted of treason by act of parliament; by which statute it was enacted, "that he should forfeit all his lands;" so that Henry the Seventh was seised of the reversion in fee; after whose death, both the estate-tail and reversion in fee descended to Henry the Eighth; that on the fifth of July, in the twenty-third year of his reign, it was found by office, that the Countess levied a fine; that she died seised of the reversion; that it descended to the Earl of Warwick; that he was attainted of treason in the nineteenth year of Henry the Seventh, by force of which attainder King Henry the Seventh was seised in fee, and died seised; after whose death it descended to Henry the Eighth, who granted it to one Walsh; and an exception was taken to this pleading, because it did not appear when the Earl of Warwick died; for though it is said in the act of attainder "that he shall forfeit," yet those words vest nothing in the king at common law until death or office found; so that there could be no seisin in Henry the Seventh as alleged; and if so, it could not descend to Henry the Eighth; therefore that allegation being wrong, it made the grant to Walsh void; but the Court was of another opinion, that the plea was good in substance, for they would not take notice of the seisin of Henry the Seventh, and the descent from him to Henry the Eighth, for that was altogether immaterial, because Henry the Eighth was entitled by virtue of the office found, and therefore his grant to Walsh was good. So here the Court will not take notice whether THE QUEEN was seised of this advowson either as appendant or in gross; for when KING JAMES and KING CHARLES had presented to the church, and their presentees were instituted and inducted, and enjoyed the same under such presentations, it is not material whether the queen was seised or not. Neither can it be objected, that the defendant in pleading has alleged this advowson to be in gross. It is true, he says, that *bene et verum est* that KING CHARLES was seised thereof in fee *ut de uno grosso*, but that cannot be any concession that it was so in THE QUEEN. And after all, admitting that the king was mistaken in the law, yet if he was truly informed of the fact, such a bare mistake shall not avoid his grant. * Here the letters patents of THE QUEEN are truly recited, of which he was well apprised; then there happens

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Cases in Law
and Equity, 362.
367.

* [300]

8. Co. 53.
2. Lev. 171.
3. Lev. 135.

* [301]

(a) 1. Co. 41. Moor. 413. 2. Roll. Rep. 114. 2. And. 154. 1. Jones, 79.

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to be a false suggestion of the patentee, and the King ratified and confirmed it, but did not grant all that was in those letters patents. Now if he apprehended that the advowson passed by this grant, it is his own collection, and not what was falsely suggested by Sir William Feekstone. So is my Lord Chandois's Case (a), to whom Henry the Seventh granted a manor in tail; and the same king, by other letters patents reciting the former grant, and that in consideration of the surrender thereof to be cancelled, he was and is seised in fee, did grant the said manor to husband and wife, and to the heirs of the husband, &c. Now though by the surrender of the first letters patents the estate-tail was not determined, and so the king not seised of the manor in fee as he recited he was in the second grant, for he had only a reversion in fee expectant upon the determination of the estate-tail; yet that clause, viz. "by a virtue whereof we are seised in fee," was but what the king collected to be the consequence of the surrender; so that being truly informed by the party both of the intail and the surrender, the mistake which he made in the law being no part of the consideration shall not avoid his grant. But admitting, in the present case, that THE QUEEN was mistaken in her grant, and so it became void, yet KING CHARLES having recited the same by other letters patents, and having granted this advowson to Sir William Feekstone and his heirs, *non obstante aliquo defectu vel aliquibus defectibus* in THE QUEEN's grant, he has a good title by such grant, for otherwise these words signify nothing; but the natural sense and meaning of them is, that if the grant of the queen was not good, yet this shall be a good grant to the patentee. Therefore it is a good rule taken in the *Earl of Cumberland's Case* (b), that if the king's grant may be taken to two intents, one of which may be good and the other not, it shall be construed to such an intent that the grant may take effect (c): as if he grant *totum illud manerium suum, sive totam illam rectoriam sive advocationem, &c.*; now if he had a manor and no rectory, or an advowson and no rectory, or a manor or a rectory improper, yet that which he had shall pass, because it was the effect of the grant. So here, whether the advowson was *appendant* or *in gross*, it is not material, for nothing shall pass but what the king had.

Comb. 308.
1. Co. 45.

* [302]

In *quare impedit*, if title be made to the advowson, by virtue of letters patent granted to A. "then ESQUIRE, and afterwards KNIGHT," and upon *oyer*, it appears that the grant was made "to A. KNIGHT," the variance is fatal; for it cannot be intended that A. in the pleadings, and A. in the letters patent, are the same person; "knight" being a name of dignity, and "esquire" a name of worship.—S. C. Carth. 440. S. C. 2. Salk. 560. Reg. 187. Cro. Car. 205. Comb. 6c. 188. Latch. 161. 8. Mod. 84. 1. Salk. 7. 50. 1. Show. 394. 3. Bac. Abr. 623, 624. 4. Bac. Abr. 211.

* Afterwards in *Hilary Term* THE COURT gave judgment, viz. Two Judges were of opinion against the judgment in the common pleas, not upon the matter in law, but for the *variance*

(a) 6. Co. 55. Hob. 224. 2. Roll Rep. 277. 360. Lane. 3. 7. 9. 76. 112.
(b) 8. Co. 167. Lane, 39.

(c) Dav. 45. 7. Co. 14. 4. Bac. Abr. 213.

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between the *pleading* and the *letters patents*; for the defendant has set forth a grant made to *William Feekstone, tunc ARMIGERO, postea MILITI*, and upon *oyer* of the letters patents it is to *William Feekstone MILITI*. Now he could not be a *knight* and *esquire* at the same time. "*Knight*" is a word of dignity and part of his name, but "*esquire*" is not; and so are all the ~~old~~ authorities (a). A BISHOP entered into a bond; the obligee was then an *esquire*, but was afterwards made a *knight*, and died; an action of debt was brought against the bishop by the plaintiff, as executor of such a one "*esquire*," which was according to the bond; but RICKHILL, Chief Justice of the common pleas, gave judgment, that the writ should abate, because he was not named *knight* (b). So where the heir apparent of the *Earl of Shrewsbury* brought an action by the name of *John Talbot knight*, and pending the suit his father died, the question was, Whether the writ should abate because the plaintiff was then an *earl*? PRISOTT, Chief Justice of the common pleas, held that it should not; but it was for this reason, because his dignity descended to him by the act of God (c); but if it had come to him by the act of the king, it had been otherwise. It is likewise so where there is an addition of *knight* when the person is not knighted, as where it is omitted when he is really so (d); for in both cases it is void in pleadings or grants, though not in a conveyance (e): and the reason is, because *knight* being made part of the name of the grantee, when in truth he was not so, he cannot be intended to be the same person mentioned in the grant. As to the *Lord Ever's Case* (f), who had a grant made to him by the name of RALPH EVER *knight*, LORD EURE, when he was not at that time a *knight*; it is true, it was held good, because *satis constat de personâ* by the addition of *Lord Eure*, for there is but one lord of that name in *England*, and therefore the addition of *knight*, though false, shall not vitiate the true description of the person. So if a grant should be made to JOHN *bishop of Winton*, when his name was *Peter*, the grant is good; for there is but one *bishop of Winton*, and therefore he is sufficiently described by that addition (g).

* But HOLT, Chief Justice, and ROKEBY, Justice of the king's bench, were of opinion, that this was a good grant in law; for they did not speak to the *variance* between the pleadings and the grant.—They held, that it was not material to alledge the exact time when THE QUEEN was seised of this advowson *in gross*; it is sufficient to alledge a seisin generally; and therefore an admission of that which is immaterial will not help. As in debt upon bond, conditioned, that if the plaintiff did not depart out of the de-

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OF CHESTER,
PEIRCE AND
COOK.

(a) 2. Inst. 594. Bro. Abr. "Addition," pl. 58.

(b) Year Book, 7. Hen. 4. pl. 7. 14. Hen. 6. pl. 15. Bro. Abr. "Nofine," pl. 33.

(c) Year Book, 22. Hen. 6. pl. 29. Ero. Abr. "Nofine," pl. 61.

(d) But see Larch. 161. Hutt. 41. Lit. Rep. 181. Jones, 215.

(e) Long Quinto, 106. b. 8. Edw. 4. pl. 23. Bro. Abr. "Grants," pl. 50. 2. Roll. Abr. 198.

(f) Cro. Jac. 240.

(g)

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defendant's service without his leave, &c. then if he paid the plaintiff one hundred pounds within twenty-eight days upon demand, the bond shall be void; and the defendant pleaded, that the plaintiff, on the fourth day of *May*, in the thirtieth of *Elizabeth*, departed out of his service, and without his leave; and the plaintiff replied, that on the sixth day of *September*, in the same year, she departed with leave; and that afterwards, on the fourth of *October*, she demanded the hundred pounds, which the defendant refused to pay, *ABSQUE HOC* that she departed on the fourth of *May* without leave; and it happened that the demand was laid to be the fourth day of *October*, and the writ was *tested* on the eighteenth *October*, so that there was not twenty-eight days between the demand and the action brought; yet the plaintiff had judgment (a), though upon his own shewing he brought the action fourteen days too soon; for the issue was upon the departure, and the demand in the replication was altogether immaterial, and therefore shall be rejected as surplusage (b). Every thing in a grant shall be intended to be good, if the contrary do not appear. As in debt upon the statute 2. *Edw.* 6. for not setting out tithes, the plaintiff declared (c), that the defendants were occupiers of one hundred and twenty-eight acres of meadow in *Radley*, and he derived a title under letters patents of *QUEEN ELIZABETH* to himself for life, out of which, &c.; the defendant craved *oyer*, &c.; and it appeared that *THE QUEEN* demised the tithes of certain lands in *Bremere* and *Barton Bremere*, in the parish of *Radley*, but did not mention the hundred and twenty-eight acres, &c. yet, upon demurrer, judgment was given for the plaintiff, though it did not appear that the tithes of one hundred and twenty-eight acres were granted to him by those letters patents; neither was it averred that those acres were any of the lands mentioned in the letters patents, because the plaintiff had alledged that *THE QUEEN* granted to him *prædictas decimas*, which was a sufficient averment that those tithes passed by that grant; and if it had been otherwise, the defendant ought to have pleaded *quod non concessit*.

Then as to the other matter, this advowson might be *appendant* when the *Earl of Warwick* had it, and it might afterwards be *in gross*. It was certainly once *appendant* to the manor; and this appears in my *Lord Coke's Entries* (d); for there we find that one *Digby* was tenant in tail of this manor, who committed treason, and the church being void, *THE QUEEN* presented, then the advowson must be *in gross*; the tenant in tail was afterwards attainted, then it became *appendant* again by reason of such attainder, for there was no act done to sever the advowson from the reversion in fee. But if it did not appear to be *appendant* at the time of *THE QUEEN's* grant, yet it will pass by that grant of *CHARLES THE FIRST*; for it is granted in full, express, and large words, without any manner of restriction. And there are

(a) 2. Leon. 99.

(b) Hob. 71.

(c) Cro. Jac. 679.

(d) Co. Ent. 477.

stronger cases than this, where the king's intention appearing to pass an interest, though there happen a fault in the grant, yet it shall pass accordingly. To instance in some, viz. as where *Edward the Second* (a) by letters patents granted the castle and manor of *Skipton* in *Craven* to *Robert de Clifford* in tail, and *Henry the Sixth* granted *reversionem præd. castri et manerii* to *THOMAS Lord CLIFFORD*, *necnon castrum et manerium præd.*; now if the estate-tail was good, then he had granted the reversion only; if not, then by the words "*necnon castrum et manerium præd.*" he granted the possession. So a grant of a manor, though it be not really so, but only in reputation, is a good grant (b), and the manor will pass. There are many other cases in THE BOOKS where the king's grants have been adjudged good, and many favourable constructions have been made by the Judges to support them; as where the surrender of lands in *Suffex* was made the consideration of the queen's grant, when in truth the lands were in *Essex*, and so the county mistaken, yet the grant was held good (c), because a misprision in the recital of a thing shall not make the grant void. * So likewise where *Edward the Sixth* (d) "granted *totam illam rectoriam de DALE* *acomnes decimas, &c. quæ quidem omnia et singula præmissa* are of the true yearly value of "thirty-two pounds," and at the time of this grant there was a farm in the parish of *Dale*, in lease under a yearly rent; now the words "*quæ quidem omnia, &c.*" refer only to tithes of that yearly value, and it may be the king intended to pass no more; yet having granted *totam illam rectoriam* generally, it was adjudged that the tithes of that farm should pass, though it made it more than thirty-two pounds a year. The true way had been to have taken issue upon the traverse (e).

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* [305]

(a) 8. Co. 166.

(b) 6. Co. 63.

(c) 1. Roll. Rep. 23.

(d) 2. Roll. Rep. 118.

(e) The judgment of the Common Pleas was affirmed by HOLT, Chief Justice, and by TURTON and EYRE, Justices, S. C. 2. Salk. 561. S. C. Skin. 664. the three Judges being of opinion that the

variance (Vide ante, 302.) was so great an obstacle that they could not come at the merits of the cause, and that for this defect THE PLEA was ill. S. C. Ld. Ray. 305. But a writ of error was brought in parliament, and this judgment was reversed. S. C. Shower, Cases in Parl. 224. S. C. 12. Mod. 187.

Gatehouse against Row.

Case 138.

WRIT OF ERROR on a judgment in the Common Pleas, in an action on the case upon an *indebitatus assumpsit* and *quantum meruit*, brought by *Gatehouse* for meat, drink, &c. which the defendant had when he stood for burgess for *Stockbridge*.

Declaration upon three several promises, the last stating *cumque etiam* the aforesaid defendant, in consideration that the plaintiff provided goods, &c. *super se assumpsit* is good after verdict.—S. C. 2. Salk. 663. S. C. Comb. 404. S. C. Carth 379. S. C. 1. Ld. Ray. 145. Cro. Eliz. 79. 147. 660. Cro. Jac. 504. 1. Sid. 309; 3. Lev. 55. 1. Saund. 6. 6. Mod. 227. 260. 7. Mod. 143. Lutw. 234. 2. Ld. Ray. 1517.
"meat,

The declaration stated three several promises, the last of which was thus, "*cumque etiam præd.* (the defendant) *in consideratione* "that the plaintiff at his request had found and provided for him

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Row.

"meat, drink, &c. *super se assumpsit*," and does not say that the defendant *super se assumpsit*. This cause was tried at the assizes at Winton, and a verdict for the plaintiff Gatehouse, and entire damages given.

It was now moved in arrest of judgment, that the last was a void promise, because it was not alledged that the defendant had promised: so that possibly a stranger might make the promise, and then the defendant is not bound by it. It cannot be taken by intentment to be the defendant, because it is the very gift of the action, and since the jury have found that "Row *super se assumpsit modo et forma*," and have assessed entire damages *occasione præmissorum*, and every promise being a distinct declaration, and one of them being wrong laid, it is therefore naught. As for instance, in *assumpsit* the plaintiff declared (a), that in consideration he would marry the defendant's daughter, *super se assumpsit* to pay the plaintiff one hundred pounds. Upon *non assumpsit* pleaded, the plaintiff had a verdict; but the judgment was arrested, because it was not alledged that the defendant *super se assumpsit*, which is this very case in point. * This might have been good in an *indebitatus assumpsit* (b), because where there is a debt, the law fixes a promise upon the debtor to pay it.

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To which it was answered, that if the consideration be void, then the jury have not given damages for it, for they cannot give a verdict either for no promise, or a bad promise. As to that case in Croke before-mentioned, there were three persons named in that declaration, of which the defendant's daughter was last named, and the words *super se assumpsit* immediately following might relate to her, which was the reason of that judgment; but here there are but two persons named, so that when the plaintiff declares against the defendant, it must of necessity be intended, that the defendant *assumpsit*, and nobody else, because the consideration arises from him, and those words *cumque etiam* in the third promise couple that sentence to the first. If it had been, that the plaintiff *assumpsit* to pay himself, it had been good after a verdict (c). So if there are several considerations alledged in one declaration, and one of them is sufficient, though the other are wrong, both as to matter and form, yet the declaration will be good (d). So where an *assumpsit* was brought against an executor upon the promise of the testator, and the defendant pleaded, that he himself made no such promise; after a verdict it shall be intended to refer to the promise of the testator (e).

Carth. 6. 86.
304.
Comb. 149. 2. 4
426.
1. Vent. 122.
3. Lev. 336.
Stiles, 295.

Afterwards, in Hilary Term, the plaintiff had judgment, it being after a verdict.

(a) Cro. Eliz. 913. S. C. Noy. 50.
(b) 1. Salk. 23. 28.
(c) 1. Sid. 306. 2. Vent. 141.

(d) Cro. Eliz. 848.
(e) 1. Sid. 292. Latch. 325.

Warfopp against Abell.

Case 139.

Trinity Term, 8. Will. 3. Roll 594.

IN trespass and ejectment for a copyhold, upon the demise of *John Spencer*, the jury found a special verdict:

The admittance of the tenant for life of a copyhold estate is the admittance of these in remainder.

The substance whereof was, That *John Spencer* purchased this copyhold, and on the twenty-third of *October*, in the year 1652, took a surrender thereof to the use of himself for life, then to *Alice* his wife for life, and to the survivor of them, and after their decease, then to the use of the last will of the said *John Spencer*, and for default of such will, to his own right heirs; that he was admitted, &c.; that he made a will, and devised all his whole estate, both real and personal, to *Alice* his wife, after his * decease, the remainder to be divided between his relations on both sides, according to the discretion of his executors, and died; that the executors entered with an intent to divide the estate, pursuant to their will; but that they were not admitted to this copyhold.

1. Salk. 185.
2. Brownl. 301.
- Cro. Jac. 31.
4. Co. 22.
- Cro. Eliz. 662.
4. Leon. 111.
- Moor. 356.
1. Mod. 102.
- 120.

* [307]

The question therefore was, What estate was vested in them before admittance, and what passed by this will?

And IT WAS HELD, that the admittance of tenant for life upon a surrender, is an admittance of those in remainder.

Bennet against Talbot.

Case 140.

TRESPASS. The plaintiff declared *de placito quare vi et armis clausum ipsius (the plaintiff) fregit et intravit; et herbam pedibus ambulando conculcavit; et cum averiis bobus et vaccis* did eat his grass; *necnon* that the defendant being an inferior tradesman, viz. a clothier, *ad tunc et ibidem, in clauso præd. venatus fuit, et alia enormia ei intulit; contra pacem, et contra formam statuti, &c.* There was a general verdict for the plaintiff at the assizes at *Salisbury*.

It is actionable at common law to hunt in the soil of another; and therefore a declaration in trespass, containing one count at common law, and another on the 4. and 5. Will. & Mary, c. 23. describing the defendant, a clothier, as an inferior tradesman, for hunting in the grounds of the plaintiff, is good, although it conclude *contra formam statuti*; and the

It was moved in arrest of judgment, because part of the action was for a trespass at common law, and part upon the statute; and having concluded *contra formam statuti*, that goes to the whole.

The statute 13. Rich. 2. c. 13. enacts, "that no layman who has not lands of the yearly value of forty shillings, nor clerk who has not ten pounds a year revenue, shall have or keep a greyhound."

The statute 22. and 23. Car. 2. c. 25. provides, "That persons not having lands, or some other estate of inheritance in their own plaintiff is intitled to full costs, although the damages are under forty shillings; for the 4. and 5. Will. & Mary, c. 23. f. 10. is a repeal of the 22. and 23. Car. 2. c. 25. as to costs.—S. C. Comy. 26. S. C. 1. Ld. Ray. 149. S. C. 1. Salk. 212. S. C. Comb. 420. S. C. Carth. 382. S. C. 12. Mod. 121. S. C. Holt, 561. Vent. 103. 8. Mod. 238. 2. Bl. Rep. 900. 4. Bac. Abr. 96. Sayer's Costs, 54. Hulse on Costs, 91. 2. Wils. 70.

" or

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against
TALBOT.

"or wives right of one hundred pounds a year; or of one hundred and fifty pounds a year for life, or for ninety-nine years; shall not keep guns, &c."

And by the statute 22. and 23. Car. 2. c. 23. it was enacted, "That if the jury find the damages under forty shillings in actions of trespass, the plaintiff shall recover no more costs, and if more costs are awarded, the judgment shall be void."

* [308]

By the statute 4. and 5. Will. c. 23. it is enacted, "That all and every law and statute now in force for the better preservation of the game, shall be duly put in execution" (a). Then there is this clause, "And whereas great mischiefs do ensue by inferior tradesmen, apprentices, and other dissolute persons neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves, * and damage of their neighbours;" for remedy whereof BE IT ENACTED, &c. "that if any such person, as aforesaid, shall presume to hunt, hawk, fish, or fowl (unless in company with the master of such apprentice duly qualified by law) such person or persons shall be subject to the penalties by this act, and shall or may be sued and prosecuted for their wilful trespass in such their coming on any person's land, and if found guilty, the plaintiff shall not only recover his damages, thereby sustained, but his full costs of suit, &c."

Allen 43.
1. Hale's P. C.
437-468.
4. Co. 43.
1. Hawk. P. C.
c. 30. l. 7.
2. Hale 344.

Now this clause is a repeal of the statute 22. and 23. Car. 2. c. 23. which gives no more costs than damages. As to the matter of costs, it was said, that this was an independent clause. The plaintiff should have declared that he hunted, being an inferior tradesman (b), which had been sufficient to entitle him to costs upon a general law; and the best way had been to omit *contra formam statuti*. As for instance: one was indicted for stabbing another (c), and two others for being present, and abetting, and concluded *contra formam statuti*; they were all found guilty, when it is plain that he could only be so who gave the stroke; yet that indictment was held good, because they might have been found guilty at common law upon the same indictment, for the statute does not alter the nature of the offence, but takes away the privilege of the clergy allowed by law, and need not conclude *contra formam statuti*.

But this being moved in Hilary Term, THE COURT was of opinion, that where a statute makes an offence, the conclusion must be *contra formam statuti*. But this was an offence before the making that act (d), which only repeals that clause of the statute 23. Car. 2. c. 23. and therefore, though the declaration concludes *contra formam statuti*, it is well enough.

And so the plaintiff had judgment *nisi causa*.

(a) See 5. Ann. c. 14. 9. Ann. c. 25. (c) Allen, 43.
and 3. Geo. 1. c. 11. (d) 2. Bl. Rep. 900. Set 1. Term
(b) 3. Bl. Com. 215. 2. Wils. 70. Rep. 334.

Bracey against Harris.

Case 141.

BRACEY was summoned before COMMISSIONERS OF BANKRUPTS, to give an account of the bankrupt's estate.

The questions demanded of him were,

FIRST, To give an account of *all matters* which he knew concerning the said estate.

SECONDLY, * When and in what manner he aided and abetted the bankrupt in carrying away his effects, or in embezzling or concealing the same?

These questions he refused to answer, because THE FIRST was *too general*, and THE SECOND was to *accuse himself*; so that he would be liable to the penalty of double the value of the goods which were concealed (a): he was willing to answer what he could at present, or to any particular question which the commissioners should ask. But upon his refusal to answer those two questions, he was committed.

Having brought a *habeas corpus*, it appeared, upon the return, that the warrant of commitment concluded, that Bracey should be committed "*until he conform to the authority of the commissioners.*"

This was now alledged to be a void commitment, because they have a special authority given them by the statute 1. Jac. I. c. 15. "that if the party shall refuse to be sworn, and to answer such questions as shall be ministered to him, that then the commissioners, or the greater number of them, may commit the person refusing to prison, there to remain without bail, &c. *until he submit to the commissioners to be examined,*" and not "till he conform to the authority of the commissioners:" and therefore it was moved, that he might be discharged.

To which it was answered, that, as to the general questions, the statute does not give the commissioners power to ask such questions, even of the bankrupt himself; and that the conclusion of the warrant is well enough, for the words of the act are, "that the commissioners may commit till *he submit to be examined;*" which is a consequence that *he conform to their authority.*

But THE COURT seemed to incline, that the party need not pay a universal obedience to the commissioners, so as to answer all questions, but only to answer what he knows concerning the carrying away of any part of the bankrupt's estate by any person, but not by himself (b). But for that fault in the conclusion of the warrant of commitment, Bracey was discharged.

Commissioners of bankrupts cannot ask a person examined before them,

"what he

"knows of all

"matters con-

"cerning the

"bankrupt's

"estate," for

"it is too gene-

"ral; nor in what

"manner he as-

"sisted the bank-

"rupt to conceal his

"effects, for it

"tends to criminate

"him; and, on

"commitment, if

"they conclude

"their warrant,

"until he conform

"to our autho-

"rity," it is bad,

"and he shall be

"discharged; for

"the words of the

"statute ought to

"have been pur-

"sued.

S. C. 1. Salk.

384. 348.

S. C. Comb. 370.

S. C. Sett &

Rem. 234.

S. C. Holt, 94.

Vide post. 368.

1. Salk. 348. 351.

Ld. Ray. 99.

153.

2. Stra. 880.

1005.

2. Bl. Rep. 882.

1144.

Co. Ban. Laws,

486.

1. Bac. Abr. 382.

2. Hawk. P. C.

ch. 16. f. 18.

1. Term Rep.

653.

(a) By the statute 13. Eliz. c. 7. But see 5. Geo. 2. c. 30. Bl. Rep. 919. Prescott's Case, 2. Burr. 1122. and Pedley's Case, Cook's B. L. 480. Cases in Crown Law, 268.

(b) See Miller's Case, 3. Wils. 427. 2. Bl. Rep. 881. Langhorn's Case, 2.

Case 142.

* Jones against Bodiner.

Easter Term, 8. Will. 3. Roll 382.

An attorney of the Common Pleas who is sued, in the King's Bench, may, notwithstanding the supposition that he is in the custody of the marshal, plead his privilege in abatement, provided he has not admitted the jurisdiction.

S. C. Ante, 225.
S. C. 1. Salk. 1.
173.
S. C. 1. Ld.
Ray. 135.
1. Vent. 1.
1. Mod. 10.
Comb. 319.
Carth. 126. 363.
Stra. 191. 837.
864.
2. Ld. Ray. 1567.
2. Bl. Rep. 1085.
1. Wils. 306.
298.

AN action of trespass was brought in this court for taking the plaintiff's sheep.

The defendant pleaded his privilege, as AN ATTORNEY of the court of Common Pleas.

The plaintiff replied, *Quod per aliqua præallegat. Curia hic a cognitione placiti præd. repelli non debet, quia dicit quod præd. WILLIELMUS BODINER, tempore exhibitionis billæ ipsius, (the plaintiff) scil't 25 die Maii anno regni dom. Will'i tertii nunc regis Angliæ, &c. octavo, fuit in custodia Mar. Marefc. dom. regis coram ipso rege existen. scil't apud Westm. præd. in com. præd. ad seclam cuiusdam CATHERINÆ MADERN vid. in quodam placito transgr. et adtunc et ibidem per curiam præd. idem WILLIELMUS tradit. fuit in ballium in placito præd. ad seclam dictæ CATHERINÆ prout patet per recordum inde in curia dicti domini regis coram ipso rege nunc hic apud Westm. præd. remanen. Super quo præd. (the plaintiff) postea scil't eodem 25 die Maii anno octavo supradicto (placito præd. præfat. CATHERINÆ minime determinat. existen.) secundum conf. hic a tempore cuius contrarii memoria hominum usitat. et approbat. billam suam versus præd. WILLIELMUM in curia hic exhibuit prout ei bene licuit: et hoc paratus est verificare; unde petit iudicium, et quod præd. WILLIELMUS ad billam suam præd. respondeat, &c.*

B. SHOWER.

Demurrer, and joinder in demurrer.

IT WAS INSISTED for the defendant, that he being in the custody of the marshal, shall not hinder him from pleading his privilege of an attorney of the common pleas; and to prove it, a case was cited out of the Year-Book (a), which was an action of trespass brought in the king's bench, supposing it to be done in a franchise; and the bailiff of that franchise demanding cognizance (which is the same thing as privilege) it was opposed, because it was not claimed whilst the process was continued; but the Court was of opinion, that it might be demanded at any time.

27. H. 6. 6. a.
2. Roll. Abr.
275.

THE COURT. It is by compulsion of law that the defendant was in custody of the marshal, and therefore he shall have his privilege (b) of attorney of the common pleas; but if he had admitted the jurisdiction of the court of king's bench, it had been otherwise.

Judgment, that the bill shall abate.

(a) 22. Affize, pl. 83.

(b) Year Book 27. Hen. 6. pl. 6. a.

a. Roll. Abr. 275.

* Norris against Mawditt.

Case 143.

Michaelmas Term, 8. Will. 3. Roll 169.

WRIT OF ERROR on a judgment in the common pleas, in an action of debt brought upon the statute 23. Hen. 6. c. 15. for a false return of a burgess to serve in parliament for the borough of *Liverpool*: the action was, *ad respondendum tam dom. regi quam* (to the plaintiff) *qui sequitur*, &c.

Qu. Whether in a declaration on the 23. Hen. 6. c. 15. for a false return of the election of a burgess to parliament, it is necessary to aver that the person elected was not one of those descriptions of persons who are excluded by the act.

The statute enacts, "That if any mayor, &c. shall return other than the person chosen by the burgesses of the borough where such election shall be made, that he shall forfeit to the king forty pounds, and also gives an action of debt for forty pounds against such mayor, &c. his executors and administrators, to any person chosen and not returned, or to any other person who, in default of such burgess so chosen, will sue for the same."

The plaintiff declared, that the town of *Liverpool* was an ancient borough, out of which two members were to be chosen to serve in parliament by those burgesses there, who have a right to vote; that upon the death of the *Earl Rivers*, his honour descended to the *Lord Colchester*, who served for that borough; and that, he being removed to the house of peers, a writ issued out of chancery, directed to the chancellor of the *Duchy of Lancaster*, &c. who directed his writ, under seal of the county palatine of *Lancaster*, to the sheriff of that county, commanding him to cause another burgess to be elected in his room; that the sheriff made a precept to the mayor, &c. of *Liverpool*, commanding them to proceed to an election, &c.; that the plaintiff, on such a day and year, was, and is still a free burgess of that place, on which day he was chosen a burgess to serve in parliament for that borough, in the room of the *Lord Colchester*; but that the defendant had returned *Mr. Brotherton*. There was a judgment against the defendant by default, and a writ of error brought, and the general error assigned.

S.C. Comb. 430.
1. Mod. 145,
146, &c.
2. Lev. 114.
Pollex 470.
Farest. 13.
6. Mod. 45. 49.
3. Keb. 365.
380. 664.
1. Salk. 19.
2. Salk. 503,
504.
1. Show. 353.
4. Mod. 129.
Comb. 194.

And now several exceptions were taken to the declaration.

FIRST, As to the person supposed to be elected, he should have averred, that he was none of those excluded by the act, as sheriff, lawyer, merchant, or infant; for the authority given by the act is limited both as to the person to be chosen, and by whom the choice is to be made; and the plaintiff had not brought himself within either.

To this exception it was answered, that it is sufficient to shew that the plaintiff *debito modo fuit electus*, and he need not set forth, that those who chose him had a right to elect, or that he is not a person excepted, and the rather because the action is brought against the defendant for a wrong done.

A declaration on 23. Hen. 6. c. 15. stating that the sheriff directed his precept to the mayor, to chuse a burgess of the discreet men of the borough, is good, although the precept do not direct the choice, pursuant to the statute, to be "by burgesses."

* SECONDLY, This action is founded on the statute 23. Hen. 6. c. 15. which directs how and in what manner the sheriff, after the receipt of the writ, shall make his precept under his seal, viz. to the mayor, &c. (reciting the writ) and commanding him by the said precept (if it be in a borough) to chuse a burgess *by burgesses*. But this precept, set forth in the declaration, is directed to the mayor to chuse one burgess of the discreet men of the borough, and does not say "by burgesses". It is not enough for the plaintiff to say, that he was a free burgess on such a day, &c. and that he was chosen on that day; for he ought to set forth how, and by whom, either by the burgesses, or by virtue of the precept directed to the mayor and burgesses, which gives them power to chuse. The plaintiff might have waived this *action of debt*, and brought one for a *false return*; but having founded it on the statute for a sum certain, and not pursued the directions on that statute, he cannot come at the penalty.

As to this objection concerning the form of the precept directed to the mayor, to chuse one burgess, without saying "by burgesses," and so not pursuant to the statute, it was said, that no advantage shall be taken of this omission now, as it might, if the precept had been void of itself; because the mayor is bound to obey. It is like the case of a sheriff who levies goods upon a *fieri facias* without a *testatum*, and upon an action brought against him, it will not be allowed that he shall take any advantage of an irregular process. But by returning *Mr. Brotherton*, he has admitted the precept to be good, and when he took it as such and executed it after a wrong manner, he must be charged with an action. Neither is it necessary for the plaintiff to shew that he was chosen by virtue of that precept; for he alledged, that he was chosen *loco domini Colchester*, and that is sufficient.

THE COURT said, the precept was well enough, for it commands them to chuse burgesses *de eodem burgo*, which is more than what the law was before the making of the act.

A declaration on 23. Hen. 6. c. 15. in debt *tam pro domino rege quam se ipso*, is good.

Ld. Ray. 78.
6. Mod. 219.
3. Bac. Ab. 506.
Doug. 235.
1. Bl. Rep. 312.

* [313]

THIRDLY, The action is not well brought as to the form in the commencement of it, for it is in debt, *tam pro domino rege quam se ipso*, when, in such case, the king ought to be made a party. The difference is thus: When a statute makes an offence, and adds no penalty, the action brought against the offender must be *qui tam*, &c. but where a penalty is given to the party injured, the king must never be joined in that action. Now in this case, there is a particular measure of the subject's wrong, and likewise a measure of the forfeiture to the king; for which reason, they ought not to be joined in this action (a). As in debt upon the statute of 2. and 3. Edw. 6. c. 13. for not setting out tithes, if it is in the *qui tam*, &c. it is naught, because the treble value is given to the party grieved, and the king can have no benefit of it (b). All the pre-

(a) Moor, 63. 1. And. 138.

(b) Cro. Eliz. 621. Moor, 911.

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cedents in cases of this nature begin with "*summonitus fuit ad respondendum*" to the plaintiff; and conclude, "*per quod actio accrevit*" to him alone (a).

NORRIS
against
MAWDITT.

As to this objection, viz. that in this action the king ought not to be made a party, it was answered, that the form is well enough, for it is brought in the *qui tam*, &c. for a contempt to the king, who has a disappointment of a member to serve in parliament; and this was occasioned by a false return; but, at the most, it is but matter of form and surplage. The statute 8. Hen. 6. c. 10, gives an action on the case and treble damages to the party grieved, who by conspiracy is indicted in any other county than where he dwells, and is acquitted; and yet such action is brought *tam pro domino rege quam pro seipso*. So it is upon the statute of HUE AND CRY, and it is always so in prohibitions, for there is a fine due to the king for the contempt to his laws; and therefore it must be *tam pro domino rege, &c.* (b).

NOTE, READER, This is not very clear, for no penalty is given to the king by those statutes, and in such case a fine is always for a contempt; but here is a penalty of forty pounds given by this statute to the plaintiff.

But to proceed. A man was outlawed after judgment (c), and arrested upon the *capias utlagatum*, and escaped; and in an action brought against the sheriff, *tam pro domina regina, &c.* * this was assigned for error, but adjudged good; for it is a contempt of the queen to suffer a person outlawed to escape.

* [314]

CURIA. As to the objection to the form of this action, that it is brought *tam pro domino rege quam pro seipso*, it is true, that where a statute gives damages to the party injured, as for instance the statute of 2. Rich. 2. c. 5. for a *scandalum magnatum*, it is usual to join the king with the party (d); but where a sum certain is given, as in this case, they need not be joined (e). So upon the statute of HUE AND CRY, they are always joined. But here is a contempt made by the defendant to an express law, which is punishable by fine (f), and therefore the action may be brought *qui tam, &c.* There was the like precedent in this court, between *Culliford and The Mayor of Dorchester* (g), in the third year of William and Mary, which was an action of debt upon a false return in this very form.

Sed adjournatur.

- (a) Plowd. 118. Rastall's Entries, 446. 186. Placit. Red. 72.
(b) Rastall Ent. 403.
(c) Eden v. Lloyd, Cro. Eliz. 877.
(d) See also 3. Edw. 1. c. 34.
(e) Co. Ent. 349.
(f) 2. Hawk. P. C. c. 22. § 34.
(g) 4. Mod. 129. S. C. 1. Show. 353.
S. C. Comb. 194. S. C. 12. Mod. 26.

Cafe 144.

Hackshaw against Clerke.

To *case* on a bill of exchange, A *PLEA*, that he gave a bond in discharge of the bill, is bad; for it amounts to the general issue. Ante, 253. Post, 367.

Co. Lit. 303.
1. Sid. 450.
Cro. Eliz. 201.

AN action on the case was brought upon a *bill of exchange*, to which the defendant pleaded, that, after the acceptance of the bill, he gave a bond in discharge thereof.

Upon demurrer to this plea, it was objected, that it amounted to the *general issue*; for the debt upon the bill being extinguished by the bond, the defendant ought to have pleaded *non assumpsit*, and to have given the bond in evidence.

And THE COURT seemed of that opinion. But by consent, the defendant pleaded the general issue.

3. Mod. 166. 5. Com. Dig. "Pleader," E. 14. (2. G. 12.) 4. Bac. Abr. 63.

Cafe 145.

The King against Owen.

A *mandamus* to a mayor to deliver the ensigns of his office to his successor, is good, though the words, "or signify to us cause," be omitted.

MANDAMUS to shew cause why the defendant did not deliver THE MACE, and other ensigns of mayoralty, to one Bennet, the succeeding mayor, &c. in which writ the usual clause, "*vel causam nobis significetis*," was left out.

Upon a motion made to quash the writ, it was argued, that those words were so material, that they could not be omitted; and it was compared to a *præcipe quod reddat* for land, or a *præcipe quod reddat rationabilem computum*; which writs must always conclude thus, "*vel ostensurus quare non fecerit, &c.*"

* [315]

S. C. 4. Mod. 293.
S. C. Comb. 399.
S. C. Skin. 669.
S. C. Holt, 190.
2. Jones, 177.
1. Sid. 31.
Skin. 359.
Comb. 102.
5. Com. Dig. "Mandamus," (C. 3)

* But on the other side, the case of *The King v. St. John's College* (a) was remembered in this court, where the same words were left out of a *mandamus*, the writ concluding *sicut informamur*; and the Court would not quash it (b), because, it being a *mandatory writ*, the person to whom it is directed ought to make a return, or obey it, and it is not absolutely necessary that these words should be inserted. They were first introduced in *James Baggs's Case* (c), but have been omitted in many cases since.

And therefore a *pluries mandamus* was now granted,

2. Stra. 948. 2. Bar. K. B. 235. 3. Bac. Abr. 537.---544.

(a) 4. Mod. 233.

(b) But see Skin. 549. Comb. 282.

4. Mod. 241. *notis*.

(c) 11. Co. 93.

Cafe 146.

Blanchly against Fry.

In trespass for breaking and entering the plaintiff's close, and cutting down his corn,

TRESPASS *quare clausum fregit*, and for cutting and carrying away his corn. The jury found the defendant guilty of breaking the close and cutting the corn, but not of the carrying it away, and gave ten shillings damages.

there shall be no more costs than damages, unless the judge certify under 22. Car. 2. c. 9. that the freehold or title were in question.—S. C. 1. Salk. 193. S. C. Comb. 399. S. C. Skin. 666. S. C. Comy. 19. Ante, 74. Carth. 224. 2. Vent. 180. Stra. 645. 633. 3. Burr. 1282. Dougl. 780. 1. Term Rep. 655. Hullock on Costs, 66. 3. Com. Dig. "Costs," (A. 3.) Bull. N. P. 329.

And

And now it was moved in arrest of judgment; the question being, Whether this case be within either of the statutes, which give no more costs than damages?

The statute of 43. *Eliz. c. 6.* enacts, "That if upon any personal action to be brought in the king's courts at *Westminster*, not being for any title or interest of lands, nor concerning the freehold of any lands, nor for any battery, it shall appear to the judge who tried the cause, and so signified by him, that the debt or damages recovered shall not amount to forty shillings, or above, that he shall not award for costs more than the debt or damages recovered."

The statute 22. and 23. *Car. 2. c. 9.* recites that former statute, and enacts, "That in all actions of trespass, assault and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not certify upon the back of the record, that the assault and battery was sufficiently proved, or that the freehold or title was chiefly in question, if the damages found be under forty shillings, the plaintiff shall have no more costs, and if more shall be awarded, the judgment shall be void; and the defendant may have an action for such vexatious suit."

In this case, the freehold or title of the land was not in question, the action being brought against a gentleman for entering into the plaintiff's ground, who was then following his game in hunting.

But it was said, that in a like action for breaking and entering a house, and breaking the plaintiff's glass windows, and disturbing him in his possession, the plaintiff had * judgment and full costs; which was denied by THE CHIEF JUSTICE to be so (a). So where the plaintiff declared for breaking and entering his close, and for ploughing up his ground, he had full costs (b). So for entering his boat, and cutting his rope (c), and but a penny damages, yet the plaintiff had full costs.

Adjournatur (d).

(a) *Gardiner's Case*, 2. Vent. 215. and see the case of *Brick v. Duffey*, Bull. N. P. 33. and *Beck v. Nichols*, 1. Stra. 557. accord.

(b) But see *Smithson v. Long*, *Cases Pract. C. B. 2.* and *Hafeltine v. Workham*, *Hullock on Costs*, 66. contra.

(c) *Haines v. Hughes*, Comb. 324. But see the case of *Walker v. Robinson*, 1. Wils. 93. 2. Stra. 1232.

(d) THE COURT, after several debates, inclined to be of opinion, that if any thing had been carried away, or the defendant had entered claiming title, then full costs should have been given; but when it does not appear that the trespass was committed under pretence of title, or that any thing was carried away, there we cannot make a construction contrary to the express words of the act of parliament, S. C.

Comy. Rep. 20. S. C. Skin. 666. But it does not appear that any judgment was given, S. C. Comb. 400. It is said, S. C. Skin. 666. the Court agreed that if the defendant had carried the corn away, though not off the premises, the plaintiff would have been intitled to full costs. But in the case of *Franklin v. Jolland*, 1. Stra. 634. HOLT, Chief Justice, says, by asportation in this case is meant a carrying quite away, S. P. 1. Gilb. Eq. Rep. 198. The asportation also must be of a personal chattel, for when the carrying away alledged in the declaration is only the mode in which the injury was done to the land, there shall be no more costs than damages, *Clegg v. Molyneux*, Dougl. 780. See also *Smith v. Charles*, 2. Stra. 1130. and *Hullock on Costs*, 64. to 90. where all the cases on this subject are collected.

BLANCHET
Ogby
TRY.

* [316]
Comb. 75. 222.
324.
Fitzg. 42.
Skin. 666.
S. Mod. 371.
Carth. 225.
Ray. 487.

Cafe 147.

The King againſt Slatford.

To a *mandamus* to admit a perſon *town-clerk* of a city, it is not ſufficient to re- turn that he had not taken the oaths before the mayor according to the ſtatute 13. Car. 2. c. 1. for he might have taken them before two juſti- ces; but to an officer who is bound to take the oaths, it is no excuſe that they were not tendered to him.

S. C. 2. Salk.
428.

S. C. Comb.

419.

S. C. Holt, 438.

Poſt. 402. 431.

2. Jones, 121.

2. Lev. 242.

Comb. 419.

Stra. 121. 677.

4. Com. Dig.

"Franchiſe,"

(F. 29.)

* [317]

3. Bac. Abr. 726,
727.

1. Hawk. P. C.
ch. 8.

3. Burn's Juſ-
tice, 249.

MANDAMUS iſſued to the mayor and commonalty of the city of *Oxford*, to admit *Slatford* to be their *town-clerk*. They return, that he had not taken the oaths according to the ſtatute 13. Car. 2. c. 1.

LEVINZ, Serjeant, excepted to this return. They have not returned that they adminiſtered the oaths to him; which they ſhould have done, for no man can give himſelf an oath; ſo that it was a duty incumbent on this corporation to have tendered the oaths to all their officers, and all oaths muſt be tendered by ſome perſon who had lawful authority to tender them; and for aught appears, he might deſire to take the oaths, and they would not give them.

HARCOURT, contra. This is an officer removeable at pleaſure by the mayor and commonalty; and if they have a power to remove him, and act in purſuance of that power, the Court will not grant a *mandamus* to have him reſtored. So is 1. *Sid.* 14. *Ventr.* 77. But with ſubmiſſion, there is very little in **MR. SERJEANT'S** objection, for the party is bound at his peril to take theſe oaths. And you may as well ſay, that upon a return of 25. Car. 2. it muſt appear that the perſon tendered the ſacrament, as to ſay, that the corporation is bound to tender the oaths.

HOLT, Chief Juſtice. Though a man who holds but at will may be removed without cauſe, yet the corporation here have not declared their will to remove him; which they muſt do, or elſe we cannot take notice of it. But the words of the ſtatute are very poſitive, "that at the time of the taking the oaths of his office, he ſhall take the other oaths, and ſubſcribe the Declaration." The caſe of *the King v. Thacker (a)* is plain againſt you: A *mandamus* iſſued to the mayor, &c. of *Norwich* * to reſtore an alderman; they returned, that he, being elected, took the oaths in the ſaid act of 1. *Will. and Mary*, c. 6. and of 13. Car. 2. c. 1. and pronounced THE DECLARATION, but that he did not ſubſcribe when he took the oaths to execute the ſaid office; and Counſel excepted to the return, becauſe it did not appear that he was required to make the ſubſcription, or that the Declaration was tendered to him to be ſubſcribed, and the act requires tender, and the proviſo refers to it; but the Court held that tender is not neceſſary, and the officer ought to do it at his peril, and the office is void for non-ſubſcription by the words of the act; and the ſaid cauſe was allowed by the Court. Indeed, if the mayor and commonalty ſhould reſuſe to adminiſter the oaths, it is a great miſdemeanor, for which an information will lie, and it is finable. And conſider whether an action will not lie againſt the mayor for not tendering theſe oaths for damages in loſing the place by it, for they ought to have tendered them; and the words of the act are, "that the oaths ſhall

(a) Sir T. Jones, 121.

Michaelmas Term, 8. Will. 3. In B. R.

"be administered:" but however, the party must take them at his peril: the words of the statute are strong against him,

THE KING
against
SLATFORD,

At another day,

WEBB. My first exception to the return is, that they have made it narrower than it ought to have been; for they say, that he did not take the oaths before the *mayor and commonalty*; but they do not say that he did not take them before two *justices of the peace*: so that, for aught appears, he might have taken them before two justices of the peace, and then we have a good title; and a return must be certain to every intent, for we have no opportunity as in pleas in bar to reply, and therefore they need not be so very certain,

SECOND EXCEPTION. They do not give us negative words; they do not say that "we had got no better title," for they only give us a defeasible title; but they ought to have added, that "we have no other title;" for perhaps he might have been chosen afterwards, and might have had another good title,

SHOWER, *à contra*. As to THE FIRST EXCEPTION, we have said, that he did not take the oaths when he was chosen to this office, and that is sufficient, for that implies he did not take them then before any one: besides, by the act he ought to take the oaths before the mayor and commonalty,

* As for the SECOND EXCEPTION, we have sufficiently alledged his having no title. Then this writ of *mandamus* only concerns the possession, and does not determine the right; therefore the return to it need not be so very certain. Then the words of the statute are, that they are authorized to tender the oaths, but not commanded to do it.

[318]

HOLT, *Chief Justice*. The design of this act was to secure the Government in general, and likewise the Corporations in particular, therefore at his peril he must take the oaths; otherwise the corporation, by agreement amongst themselves not to tender the oaths, might dispense with the act, which might prejudice the Government,

A man at his
peril must take
the oaths in the
corporation act.

Then the question is, Whether two justices of the peace have power to administer the oaths in case of omission of the mayor and commonalty? If so, then the return is too short.

At another day,

WRIGHT, *Serjeant*. The great exception is, that it is said, he ought to take the oaths *coram majore pro tempore existens*: so that it is wholly uncertain whether it be meant before the mayor at the time of making the letters patents, or at the time of making the statute in king *Charles the Second's* time, when the statute was made to regulate corporations, or at the time of the late act.

NORTHEY.

THE KING
against
SLATFORD.

NORTHEY. Though the statute be mis-recited, yet it being a publick act, your Lordship will take notice of it. As for the exception, *pro tempore existen'*, so much relied on, it shall be intended before the mayor for the time being at the time of taking the oaths; it shall be understood *eodem tempore* when he took the oaths.

HOLT, Chief Justice. As to the mis-recital, if there be sufficient recited for the plaintiff's case, it is well enough. So in the case of robbery on the statute of HUE AND CRY, though the plaintiff in recital of this statute omit "*murder*," yet the plaintiff will have judgment.

Afterwards, in Trinity Term following, a *peremptory mandamus* was granted, for that by the twelfth paragraph he might have taken the oaths before two justices of the peace. If the justices of the peace have power to administer the oaths as well as the mayor, and you have returned only that he did not take them before the mayor, it is ill, and the return is too short.

[Case 148.

* [319]

* Clark's Case.

The custom of London, that if any freeman refuse to take upon him the office of livery-man of a company when thereto required, he may be convicted and imprisoned by the mayor and aldermen, is a good custom.

S. C. Ante, 156.

S. C. 1. Salk.

349.

S. C. Holt, 430.

S. C. Comb. 411.

S. C. 3. Salk. 92.

S. C. 12. Mod.

113.

S. C. Comy. 24.

Post. 442.

Ante, 104. 156.

1. Salk. 192.

193. 341. 352.

6. Mod. 123.

177.

1. Mod. 10. 164.

Ante, 104, 105.

156, 157.

6. Mod. 123.

HALL. This comes before your Lordship upon a return to a *habeas corpus*. They set forth the charter of the CITY OF LONDON, &c. and farther say, that in the said city there are several companies and societies; that THE COMPANY OF VINTNERS is one of them, &c.; that those companies are under the government of the mayor and aldermen; and that, if any refuse to take upon him the office of a livery-man of any company, he might be thereof convicted and imprisoned by the mayor and aldermen; that CLARK refused to take upon him the office of a livery-man of the COMPANY OF VINTNERS, though he was a citizen and freeman of London, and subject to the same; and that therefore the mayor and aldermen committed him to *Fell* the keeper of *Newgate*, until he should take upon him the said office. I think this case to be of great consequence to the liberty of the subject, which, my LORD COKE says (*a*), is more precious than the advantage of any particular society. There have been many exceptions taken already, and many authorities quoted; and amongst the rest, the most remarkable are *Grafton's Case* (*b*), and *Tavernor's Case* (*c*). In this last case *Tavernor* was chosen a livery-man of THE COMPANY OF VINTNERS, and refused, and they assailed a fine of thirty-one pounds eight shillings and fourpence, according to a bye-law; and the Court said, that it is not unreasonable and against law. Were the fine more or less, it would not make the bye-law void, for it is only to bind the members of a corporation; and when a man agrees to be of A COMPANY, he thereby submits to the laws thereof, and they are not to take notice

1. Mod. 18. 164. 2. Keb. 555. 1. Bac. Ab. 671. 681. 1. Salk. 192. 341. 352.

(a) 2. Inst. 45, 46. 3. Inst. 124.

S. C. March, 179.

(b) 1. Mod. 10. S. C. 2. Keb. 955.

(c) Raym. 447.

of the extravagancy of the charges they lay upon themselves; and it is convenient to keep up their reputation and the honour of the city of London to have such power. **CLARK'S CASE,**

Then it has been already observed, that this return is only by way of recital. Now I shall add what occurs to me:

FIRST, It does not appear that he was chosen to be a livery-man; for the word "*electus*" is not there.

* SECONDLY, They ought to have alledged, that *Mr. Clark* had no reasonable excuse; for that they entitle themselves to so supreme a power of committing his Majesty's subjects to prison.

THIRDLY, It does not appear that *Mr. Fell* was an officer of the city, (This exception was much insisted on in a former argument in this Case.) **Ante, 156.**

FOURTHLY, They ought to have asked *Clark* before the commitment, What he had to say for himself? as the practice is always in criminal cases.

FIFTHLY, A custom to commit a man to prison, is a void custom. 2. *Brownl.* 191. The Case of the *Cinque-Ports*, 1. *Leon.* 105, 106. 4. *Leon.* 109. *Style*, 78. 84. 1. *Roll. Abr.* 364. *Marsh. Rep.* 186, 187. *Langham's case.* **Vide ante, 105, 107. 156, 157.**

SIXTHLY, As for the objection, that this custom is confirmed by act of parliament, there are several statutes that are adjudged to be void, which are unreasonable in themselves (a).

SEVENTHLY, Then it does not appear in all this return, that these *livery-men* are of any use to the good government of the city, which should have been taken notice of.

HOLT, *Chief Justice.* We ought as far as we can by law to support the government of all societies and corporations, especially this of the CITY OF LONDON; and if the mayor and aldermen should not have power to punish offenders in a summary way, then farewell the government of the city. But the exception which sticks with me most is, that it is not set out that *Fell* is an officer of the city; and indeed I think not that he is an officer of the city *quatenus* a city, though I confess he is an officer to the sheriffs, as he keeps the county gaol: but it ought to have appeared, that he was committed to an officer of the mayor and aldermen.

Clark was afterwards discharged PER TOTAM CURIAM, though ALL THE COURT declared their opinion, that the custom was a good custom, and was for the advantage of the good government of the city, and therefore they would always support it.

(a) *Magdalen College Case*, 1. *Mod.* 164.

Case 149.

* The King against Peckham.

If a statute inflict a penalty, provided the offender be prosecuted within twelve months after the offence committed, the months shall be accounted lunar months.

S. C. Comb.

439.

S. C. Carth. 406.

Skip. 562.

Carth. 501.

THE statute 3. and 4. Will. and Mary, c. 10. enacts, "That if any-one shall unlawfully course, hunt, take in toils, kill, wound, or take away, any red or fallow deer, in any forest, chase, or purlieu, paddock, wood, park, or other ground enclosed where deer are usually kept, without the consent of the owner or keeper, or shall be aiding or assisting therein, and shall be convicted either by confession, or by the oath of one or more witnesses, before one or more justices of the peace where the offence was committed, or party apprehended; such person being prosecuted within twelve months after the offence committed, shall be liable to a fine of twenty pounds for every offence, though no deer is taken; but if killed, wounded, or taken, thirty pounds for every deer, to be levied by distress, by warrant under the hand of that justice or justices before whom the conviction was made, one third to the informer, another to the poor, another to the owner of the deer or park; and if no distress can be had, then the offender is to be imprisoned for a year, and stand in the pillory (a)."

One Peckham was convicted upon this act for stealing a deer; which conviction being removed into the court of king's bench by certiorari and filed,

Exception was made to it, that the conviction being made upon this statute, the prosecution ought to have been within twelve months, which it was not; for the offence appeared to be done on the fourteenth of August, in the seventh year of William the Third, and the information was exhibited the thirteenth August, in the eighth year of William the Third, and not before. Now an information is no prosecution; and if so, the party was not prosecuted within twelve months after the offence committed,

To which it was answered, AND SO RULED, that the record sets forth, that the defendant *debito modo et secundum formam statuti convictus fuit* (b), which is well enough (c).

(a) Repealed by 16. Geo. 3. c. 30.

(b) See 1. Salk. 383.

(c) The conviction was quashed, because where months are mentioned in a statute, and not years, they are always reckoned lunar months, and in the present

case twelve lunar months had expired before any prosecution was commenced, S. C. Carth. 407.; for the statute giving the justices a special jurisdiction not known to the common law, must be strictly pursued. S. C. Comb. 439.

Case 150.

The Inhabitants of Chittington against the Inhabitants of Penshurst.

An order of removal need not allege that the party came to settle in a tenement under ten pounds a-year. S. C. Foley, 97. 6. Mod. 180. Post. 322. 325. 330. Ante, 149. 162. 208.

AN ORDER was made by two justices of peace to remove a poor man from the parish of Chittington to the parish of Penshurst; which order was confirmed upon an appeal.

2. Bott. P. L. 774. 774.

* And

* And now a motion was made to quash the first order, because it did not shew that the man settled in a tenement under the yearly value of ten pounds.

THE COURT disallowed this exception, which was the same formerly over-ruled in the case of *The Inhabitants of Marlborough v. Wootton Rivers* (a).

SECONDLY, It was objected, that the statute 13. and 14. Car. 2. c. 12. enables two justices of peace to remove the party, one of whom is to be of *the quorum*, which word was omitted in that order.

And the order was quashed for this exception, THE COURT being of opinion, that two justices cannot remove a poor man out of sessions, unless one of them be of *the quorum*, because they have a special jurisdiction given by the act, which must be followed (b).

Formerly an order of removal by two justices, neither of whom were of *the quorum*, was bad. S. C. 2. Salk. 473. 475. S. C. Sett. et Rem. 271.

S. C. Holt, 507. Comb. 200. 339. 7. Mod. 99. Stra. 300.

(a) *Weston Rivers v. St. Peter's Marlborough*, Holt, 510. 2. Salk. 492. Carth. 365. 3. Salk. 254. 12. Mod. 89. And see *Rex v. Wootton Rivers*, ante, 149.

(b) But now by 26. Geo. 2. c. 27. no order or other instrument by two or more justices, which doth not express that one

is of *the quorum*, shall be impeached, set aside, or vacated, for that defect only: and by 7. Geo. 3. c. 21. all orders and other instruments by two justices of any corporation as have only one justice of *the quorum*, shall be valid, as if one of the said justices had been of *the quorum*. See 1. Bl. Com. 351.

The Parish of Walton against The Parish of Chesterfield. Case 151.

AN ORDER was made to remove a poor man from the parish of *Walton* to the parish of *Chesterfield* in the county of *Derby*, which was confirmed upon an appeal.

But the first order was now quashed, because it did appear to be made by two justices of the peace; it is only, "WHEREAS *complaint has been made to us*;" and so they did not recite their authority in the order. It is true, they were mentioned to be justices upon *the appeal*, but that will not help, for they might be so then (a), and not at the making the first order.

And for this reason it was quashed (b).

(a) But see the case *Rex v. Flisher*, that to state upon *appeal* that the persons whose acts are complained against are justices, is so far an admission of their jurisdiction, Cald. 135.

(b) See *Rex v. Upton*, Sett. et Rem.

27. *Rex v. Stepney*, Burr. S. C. 23. *Rex v. Stanstead*, 2. Salk. 488. *Rex v. Inhabitants of Statfold*, 4. Term Rep. 597. and Mr. Const's Edition of Bott's Poor Laws, vol. ii. chap. 12. sect. 2. and 3.

An order of removal must state that it was made by two justices.

S. C. Fost. 214. Post. 325. Ante, 149. 163. 204. 6. Mod. 180. 2. Bl. Rep. 1017. Andr. 238. Burr. S. C. 137.

HILARY TERM,

The Eighth of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt,

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

* Memorandum.

* [323]

Cafe 152.

WRIGHT, *Serjeant*, was this Term called within the bar, being made King's Serjeant, and afterwards Lord Keeper of the Great Seal.

1. *Ld. Ray.* 135.

Mrs. Barney's Cafe.

Cafe 153.

A BILL OF INDICTMENT was found against her at the quarter sessions in *Norwich*, for petty treason and murder of her husband.

The court of king's bench may, in its discretion, bail a person indicted for *petty treason* and *murder*.

She came now in custody, and moved the court, by her Counsel, that she might be bailed.

It is true, this case is not within the common rule; but it appearing by affidavits of the fact, that it was a malicious prosecution, and there being nothing done either upon the indictment or coroner's inquest, or at the assizes, and the man being dead above a year, she was bailed.

S. C. 3. *Salk.* 56.
S. C. Comb. 405.
Post. 455.
2. *Jones.* 210.
2. *Inst.* 185.
1. *Bull.* 85.
Latch. 12.

Stiles. 116. 148. *Hale P. C.* 98. 104. 1. *Salk.* 104. *Ray.* 381. *Skin.* 56. 683. 3. *Bac. Abr.* 13, 14.
2. *Hawk. P. C.* ch. 15. §. 47. f. 79.

Redwood

Case 154.

Redwood against Coward.

Trinity Term, 8. Will. 3. Roll 645:

A verdict entered that the jury *assident* instead of *assident damna* will not make the record erroneous.

WRIT OF ERROR upon a judgment for the plaintiff in the PALACE-COURT. The error was assigned in the judgment itself; for it was, that the jury *assident damna* instead of *assident*.

* [324]

S. C. 1. Salk.
328.
S. C. 12. Mod.
109.
S. C. 1. Ld. Ray.
147.
S. C. Holt, 272.
Plowd. 348.
4 Co. 7. b.
2. Saund. 96.
Comb. 398. 466.
479.

It should have been in the present tense; it is like *recuperaret damna* instead of *recuperet*, which cannot be good. Now though both these words may have the same signification, as *concessum est* is the same with *consideratum est*, &c. (a), yet usage had made the word *assident* to be the proper word in such cases.

* To which it was answered, that "*assident*" is the most proper word, for it comes from *assideo*, so does "assessor;" and the jury are the assessors of the damages.

And THE COURT was of the same opinion, but would not allow *concessum* and *consideratum* to be the same; for it may be *concessum*, and often is without *consideratum est*.

(a) See 16. & 17. Car. 2. c. 8. f. 1.

Case 155.

Salisbury against Proctor.

Quere, If a declaration in TROVER for fifty pieces of gold coined within the kingdom, without naming of what denomination of money, is good.

TROVER. The plaintiff declared, that he was possessed of divers goods, viz. of fifty pieces of gold coined within this kingdom, "*ac de viginti petrat. carnis bovine, ANGLICE*" "twenty stone of beef," *ac de viginti vasibus, ANGLICE* "wooden vessels," as his proper goods which he lost, *que quidem bona et catalla, postea, apud* such a place, *ad manus et possessionem* of defendant *per inventionem debuerunt.* There was a verdict for the plaintiff, and entire damages given.

Str. 31. 224.
227.
1. Sid. 60. 98.
Nels. Lut. 478.
Mar. 60.
Cro. Jac. 169.
Palm. 393.
Latch. 216.
Ante, 181.

And now it was moved in arrest of judgment, and these exceptions were taken:

FIRST, He has declared, that he was possessed of fifty pieces of gold coined within this kingdom, but does not name what money it was, for which reason it is uncertain; for "pieces of gold" are coined here of several values.

TROVER not vitiated by an improper Latin word.

Carr. 131.
Comb. 306.
Skin. 141.

SECONDLY, That he was possessed *de viginti petrat. carnis bovine*. Now there is no such word as *petrat.* which signifies "a stone of beef;" and there is a proper word for a stone weight. And the rule is, when an improper word is put in the declaration, for which there is a proper word to signify the same thing, it is always held to be naught.

To this objection it was said, that in the first year of the king the plaintiff declared in TROVER that he was possessed *de una pecia branditti*

Hilary Term, 8. Will. 3. In B. R.

branditti vini, and that it was held good after verdict, though there is a proper word for "brandy."

SALISBURY
against
PROCTOR.

THIRDLY, That he was possessed *de viginti vasibus*, ANGLICE "wooden vessels," the word "*vas*" is too general. So *de uno pullo* has been held ill (a) for the same reason.

Trover *de viginti vasibus* was too general.

1. Sid. 60. 1. Lev. 48. N. Lutw. 478.

FOURTHLY, It is said, these goods *ad manus* of the defendant *per invention. debuerunt* instead of *devenerunt*.

Quere, If in trover the word *debuerunt* instead of *devenerunt* be fatal.

For which reasons this is not a good declaration *.

Adjournatur (b).

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(a) An Anonymous Case, 1. Lev. 48. S. C. 1. Sid. 60. N. Lutw. 478.

held good on a demurrer to the declaration. But now by 4. Geo. 2. c. 26. and 6. Geo. 2. c. 14. s. 5. all proceedings shall be in English; so that these niceties cannot now take place.—See 1. Com. Dig. 317. 3. Bl. Com. 311.

(b) See Campbell v. St. John, 1. Ld. Ray. 20. where trover of a box and *ducentis uncis argenti*, ANGLICE plate, was

The Parish of Trowbridge against Weston.

Case 156.

EXCEPTIONS were taken to an order made by two justices of the peace concerning the removal of one *Anne Jervis*, a poor woman, from *Trowbridge* to *Weston*.

An order of removal must aver that the place WHERE was the place of the pauper's "last legal settlement."

FIRST, The order does not affirm, that the place to which she was removed was the place of her last legal settlement; it is only said by the justices, "WHEREAS we are credibly informed, &c." It should have been upon oath, and being a judgment ought to be positive and certain.

S. C. 2. Salk. 473. S. C. Sett. & Rem. 244. S. C. Holt, 572. Ante, 322. Comb. 413.

But this order being confirmed upon an appeal, THE COURT held that to be a void exception, otherwise it had been good.

SECONDLY, It does not appear that the first order was made by two justices of peace of the *division* where the person was likely to be chargeable to the parish.

An order of removal need not state the justices to be of the *division*.

And the first was held a good exception.

The King against Morgan Rice.

Case 157.

MANDAMUS to an archdeacon to swear the defendant churchwarden of a parish, setting forth, that the custom of the place was to chuse *habilem et idoneam personam* to bear the office of churchwarden; that the defendant was in court and chosen, but refused by "poor dairy-man, and unfit for the office," is bad; for the parishioners are the proper judges whether the person they elect is fit for the office.—S. C. 12. Mod. 116. S. C. 3. Salk. 90. S. C. Comb. 417. S. C. Carth. 393. S. C. Sett. & Rem. 216. S. C. 1. Ld. Ray. 138. 2. Sid. 12. 1. Vent. 143. Stiles, 457. 2. Salk. 430. 1. Salk. 166. 3. Mod. 335. 1. Bl. Rep. 28. 3. Burr. 1420. 3. Bac. Abr. 531.

A return to a *mandamus* to swear in a churchwarden, "that he was a

THE KING
against
MORGAN
RICE.

the archdeacon, &c. who returned, that the defendant was a poor dairy-man, *et minus habilis* to be a churchwarden.

* [326]

Exceptions were taken to this return. That it does not appear that there was any other man in the parish, besides the defendant, who was fit to execute this office. * The archdeacon has not an authority to refuse a churchwarden being chosen; for if such power should be allowed, the custom of chusing him will be quite overthrown. The parishioners are the proper judges of his qualifications; and the archdeacon has no more to do than to administer the oath, and admit the person chosen; and is no more a judge in this case than he is of an executor or administrator. The party refused cannot bring an action upon this return to try the right; for to say *non fuit pauper laicarius* would be very uncertain, because he may be poor in several respects, and yet not be thereby disabled to hold this office.

2. Mod. 325.

E contra. The question is, Whether the person who by law is to administer the oath of office has any power to judge of the ability of the person chosen to such office? The office is spiritual; therefore the ecclesiastical court is not only to swear him, but is likewise to judge of his ability; he is presented to them for that purpose; they have a formal proceeding to examine his sufficiency, and their determination that he is *minus habilis* must always be allowed where they have any jurisdiction of the cause. A churchwarden is an office of trust; he is made overseer of the poor by the statute of 43. Eliz. c. 2. without any election; he is accountable to the parishioners at the expiration of his office; and therefore care ought to be taken that he should be *habilis et idonea persona*.

5. C. Comb. 147.

1. Salk. 166.
Carth. 118.
Hard. 378.
Ray. 439.
1. Vent. 115.

BUT THE COURT were of opinion, that a churchwarden is a temporal officer; that he is a corporation; for actions are brought in his name, and likewise against him by his successor, to recover an account. He being then a temporal officer (a), and having a temporal trust reposed in him, and there being a custom for the parishioners to chuse him, it is the duty of the archdeacon to swear him when chosen, without enquiring into his ability. For why should he be judge of that rather than those who are most concerned in interest, which are the parishioners? And it is not to be presumed, that the archdeacon will take more care to put a fit and able person into this office than they in whose power it is to chuse him.

And for this reason the *peremptory mandamus* was granted.

(a) 2. Roll. Rep. 71. Hard. 379.

* The College of Physicians against Salmon.

Case 158.

BY the statute 14. Hen. 8. c. 5. the charter by which THE COLLEGE OF PHYSICIANS is incorporated is confirmed; which act made them a perpetual college in London, and seven miles compass thereof, with power to chuse a president every year. It enables them to purchase lands, and to sue and be sued; and prohibits any to practise physic within that circuit, unless approved under the seal of the College, upon pain of five pounds, to be divided between THE KING and THE COLLEGE.

The College of Physicians may sue by the corporate name, notwithstanding an express power is given to sue by another.

S. C. 2. Salk. 451.
S. C. 3. Salk. 102. 237.
S. C. Holt, 171.
S. C. 1. Ld. Ray. 680.
Hob. 210.
4. Mod. 47.
6. Mod. 44.
1. Bac. Abr. 502.
Cro. Eliz. 357.
Hard. 504.

An action of debt was brought upon this statute by the plaintiff, by the name of "*Præsident et Collegium seu Communitas Facultatis Medicinæ London*" against the defendant for practising physic without licence; *per quod actio accrevit domino regi et dom. reginæ et eidem præfidenti, qui tam collegio et communitate, &c.* Upon demurrer to the declaration it was insisted,

FIRST, That the action was misconceived, for it ought to be brought by the president of the college of physicians only. So is *Dr. Laughton's Case (a)*, who brought an action as president of the college of physicians in London, and of the corporation of physicians there; for THE PRESIDENT and THE COLLEGE being incorporated, they ought to join in the action; it had been naught if the action had been brought in the name of the president alone, without the college (*b*).

To this it was answered, that it might be a question, Whether this action had been good if it had been brought by THE PRESIDENT alone? but it cannot be a question, Whether it shall be good or not when brought by THE CORPORATION? In the case of *The College of Physicians v. Bush (c)*, the action was brought in the name of *præsident collegium seu communitas*, and held naught. In *Dr. Goodall's book (d)* treating of this college there are several precedents of actions brought by them in the same form as this is, and it must be the proper way to sue by THE INCORPORATE NAME.

HOLT, Chief Justice, said, there was no judgment given in the case of *The College v. Bush*; but that this is the best way of declaring, since the penalty is given to THE CORPORATION.

SECONDLY, The statute prohibits the practice of physic within seven miles of London, unless the person so practising be approved under the seal of THE COLLEGE, under the penalty of five pounds, to be divided between THE KING and THE COLLEGE. They alledge, that the defendant practised within that circuit, not being admitted under the common seal of "the president and commonalty," when the statute says, "it must be by the president and

That the defendant practised without licence from "the president and commonalty" is good, although the statute say, "president or commonalty."

(a) Laughton v. Gardiner, Cro. Jac. 121. 129. 1. Roll. Abr. 515.

(c) 4. Mod. 47. S. C. 12. Mod. 10.

(b) Corporation of Physicians v. Dr. Tenant, Jones, 262.

(d)

Hilary Term, 8. Will. 3. In B. R.

THE COLLEGE "college sive *communitas* (a) ;" and by the statute the penalty is given to the king and college, which is not the same person.

OF

PHYSICIANS

against

SALMON.

To this exception it was answered, that the words "college" and "community" are *eiusdem significationis* ; and therefore ought

* [328] to be taken so in this case.

An action on THIRDLY, The conclusion is, *per quod actio accrevit domino regi, &c. et præsidenti, qui tam, &c. collegio sive communitate, &c.* when it should have been brought by the informer, *qui tam pro &c. et præsidenti, domino rege quam pro seipso.*

14 Hen. 8. c. 5. *per quod actio accrevit domino regi, qui tam, &c. is good.*

Cro. Car. 256.

* *E contra.* As to this exception it was said, that that is of no force ; for in all informations upon penal statutes the conclusion is, *per quod actio accrevit domino regi*, and puts the king before the informer (b).

Sed adjournatur (c).

(a) The word used in THE CHARTER, according to *Ruffhead*, was "and." — *Vide* 14. & 15. Hen. 8. c. 1. f. 1. p. 13.

one way and the other. S. C. Ld. Ray. 683.

(c) Judgment was given for the plaintiff. S. C. 1. Ld. Ray. 683.

* [329]

Cafe 159. * The King against The Inhabitants of Chesterfield.

THE service for a year will not give a settlement, unless it be under a hiring for a year between the master and the servant ; and therefore if the friend of a boy give a barber six pounds a year to learn the boy to shave, and the boy serves with the barber for a year accordingly, yet he will not gain a settlement ; for the contract was not between the servant and master. — S. C. 1. Salk. 479. S. C. Skin. 671. S. C. Carth. 400. S. C. Comb. 445. S. C. 12. Mod. 132. * Salk. 533. Cases in Law and Equity, 15. 287.

ONE Francis Jenison lived as a footboy with Sir Paul Jenkinson, in Walton, which is a vill in Chesterfield : Jenison was discharged of his service, and Sir Paul sent him to Chesterfield, to one Thorp, a barber, and gave Thorp six pounds for one year to teach him to shave. The overseers of the parish of Chesterfield complained that Jenison came to be an inhabitant there, and refused to give security ; and it appearing that Walton was the last place of his legal settlement, he was sent thither by the order of two justices. The vill of Walton appealed ; and, the first order being confirmed, he was removed hither by *certiorari*.

It was said, that serving a year upon an express agreement makes him an inhabitant at Chesterfield.

E contra. The statute of 3. & 4. Will. & Mary, c. 11. is explanatory of the former laws made about settlements ; and the party must now bring himself within that act, or he can gain no settlement. That act requires, "that if an unmarried person, not having child or children (a), be lawfully hired for a year, such service shall be

(a) See *Anthony v. Cardigan*, Foley, Cald. 206. ; *Rex v. Allendale*, 3. Term 131. ; *Rex v. Bank Newton*, 2. Burr. Rep. 382. S. C. 455. ; *Rex v. Hensingham*,

"a good

Hilary Term, 8. Will. 3. In B. R.

"a good settlement." Now that must be a service for a year. This was no lawful hiring, for it does not appear that he was retained by his own consent; and an action would not have lain against him upon his departure out of his service, because there was no mutual contract between the master and servant. The agreement was made between *Sir Paul Jenkinson* and the master, who was bound only to teach the boy to shave. If this should amount to a contract between them, it must be as an apprentice; which cannot be, because not by indenture, and therefore void. If he had been an apprentice, it must be for seven years, and then his trade is accounted an estate, which is a security to the parish.

THE KING
against
THE
INHABITANTS
OF CHESTER-
FIELD.
F. N. B. 168.
B. Lit. F.

Adjournatur.

This case was spoke to again in *Easter Term* following, and it was insisted, that the order of sessions upon the appeal was final.

But afterwards, in *Trinity Term*, THE COURT held this to be no good settlement in *Chesterfield*, and that the person was well removed to *Walton (a)*.

(a) See *Gregory Stoke v. Pitminster*, 330.; *Rex v. St. Mary Guildford*, 2. Bott, 330.; *Rex v. Wroughton*, Burr. 332.; *Rex v. St. Matthew, Ipswich*, S. C. 230.; *Rex v. Weyhill*, Burr. S. C. 3. Term Rep. 449. 491.; *Rex v. Thames Ditton*, 2. Bott,

The King against Turner.

Case 160.

AN ORDER was made at the general sessions of the peace held for the county of *Wilts*, by which the defendant was assessed towards the relief of another person, by virtue of the statute of 43. *Eliz. c. 2.* and was indicted for disobeying that order; which being removed hither,

An order on 43. *Eliz. c. 2. f. 7.* for the maintenance of a poor relation must be made at a general quarter sessions.

This exception was taken to it: The order is laid to be made "ad generalem sessionem pacis tent. &c." and does not say *quarterialem*; when it is expressly required by the 43. *Eliz. c. 2. f. 7.* "that the relief shall be as the justices of the peace at their general QUARTER sessions shall assess."

S. C. 2. Salk. 474. 476. S. C. Sett. & Rem. 140. 2. Salk. 482. Carth. 455. Comb. 418. 1. Bott P.L. 314.

For which reason it was quashed.

* [330]

* The Parish of *Dalbury* against The Parish of *Foiston*. Case 161.

AN ORDER was made by two justices of the peace to remove one *Robert Blood* from the parish of *Foiston*, in the county of *Derby*, to the parish of *Dalbury*, being the place of his birth.

To gain a settlement by residing in a tenement under ten

pounds a-year there must be actual notice, pursuant to the statutes 1. *Jac. 2. c. 17.* and 3. & 4. *Will. & Mary, c. 11.*; and therefore, although a person be invited by the principal inhabitants of a parish to reside in such a tenement, and be publicly and openly employed as a smith to the parish for several years, yet, by such a residence only, he gains no settlement.—S. C. Comb. 410. S. C. Carth. 396 S. C. Sett. & Rem. 178. S. C. Foley, 123. Post. 454. 2. Salk. 533, 534, 535, 536. 1. Show. 12. 3. Mod. 247. Carth. 28. 2. Salk. 533. 2. Bott P. L. 124.

THE PARISH
OF DALBURY
against
THE PARISH
OF FOISTON.

The inhabitants of *Dalbury* appealed to the quarter sessions, and the fact was stated upon the order, "that he lived at *Foiston* a whole year, and, being a smith, worked for the lord of the manor and the vicar of the parish, in shoeing their horses;" which was held to be a sufficient notice; and therefore the order was confirmed upon the appeal, though no *notice in writing* was given to the churchwardens and overseers of the poor of the said parish of the place of his abode, and the number of his family, pursuant to the statute 1. *Jac.* 2. c. 17.

These orders being returned hither by *certiorari*, it was moved to affirm the order made upon the appeal, and said, that settlements will be as formerly before the making of that act, unless the party come clandestinely into the parish, which was not done in this case; so that having lived at *Foiston* above forty days, he is now legally settled in that place. The greater part of the parish requested this man to inhabit there, because they wanted a smith; therefore since he came thither at their desire, and openly, the statute will never extend to him, because that was made to prevent the concealing of themselves above forty days to gain a settlement. It has been held in this court, that where the parishioners of *Grampound* met at a poor man's alehouse to make a rate, it amounted to notice, though no such was given in writing; and it was allowed a good settlement after the forty days.

BUT on the other side it was said, that he was no householder, but lived with the widow of the former smith in that parish, and worked there as her servant. The intent of the statute is, that by giving notice in writing the parish may know as well the number of his family as the place of his abode; but neither the lord of the manor nor the vicar can tell how many this smith had in his family by shoeing their horses. * The last statute, 3. & 4. *Will. & Mary*, c. 12. seems to be made purposely to prevent such settlements, for it enacts, "that the forty days shall be accounted from the publication of notice in writing of the place of his abode and number of his family, which he shall deliver to the churchwarden, &c.;" and by which statute several things are allowed to make a settlement without notice in writing; as if a man execute a *public office* for a year, or shall be charged with *public taxes* to the parish, or be an unmarried person *hired for a year*, or an *apprentice*, &c. Since the making this act, it has been adjudged in this court, that if a man be *assessed* to the parish rates, and do not pay the sum at which he is assessed, that shall make no settlement (a); and yet in the *Case of Ipswich* (b) it was held, that if a man be assessed to the *lane tax* it amounts to a sufficient notice, and yet it is no parish tax.

CURIA. Notice by implication will defeat the statute 3. & 4. *Will. & Mary*, c. 11. which is explanatory of the statute 1. *Jac.* 2. c. 17. and must be pursued; for the Court cannot go beyond that explanation.

So the first order was confirmed (c).

(a) See Mr. Conft's edit. of *Bott's Poor Laws*, vol. ii. 220.

(b) *St. Helens v. St. Nicholas Abingdon*, 2. *Salk.* 472.

(c) See *Rex v. Chertsey*, post. 454. and *Rex v. Abbots Langley, Foley*, 110. *Stra.* 835. 2. *Bott's P. L.* 125. pl. 163.

E A S T E R T E R M ,

The Ninth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

• Puliston *against* Warburton and Others.

* [332]

Case 162.

EJECTMENT. The declaration was of *Trinity Term* last past, upon the demise of *John Levett* and *Anne* his wife, for lands in *Blymbill*, in the county of *Salop*, dated the tenth April 1697, and the *ouster* is laid to be, *POSTEA scilicet eodem decimo die Aprilis* 1697. The defendant's attorney entered into the common rule, to confess *lease*, *entry*, and *ouster*, and to try the cause at bar; and the same was tried accordingly last *Michaelmas Term*, which was in the year 1696, and which was half a year before the plaintiff had any title, as appeared by the declaration.

In ejectment, if the plaintiff by mistake declare on a demise at a time subsequent to the trial, the judgment shall be stayed, for it is not amendable.

S.C. 1. Salk. 48.
S.C. Carth. 401.
S. C. 12. Mod. 125.
1. Sid. 316.416.
Ray. 165.
1. Mod. 250.
Comb. 394.
1. Com. Dig. "Amendment"

Whereupon the defendants moved to stay the entry of the judgment. He had a verdict the same Term the cause was tried, by reason of this mistake of the year of Our Lord in the demise, which should have been 1696 instead of 1697, and they had a rule accordingly.

(L. 2.).
1. Wils. 1.
2. Bac. Abr. 163.
1. Term Rep. 782.

And the first day of the last Term the defendants moved it again, and the rule was continued till the plaintiff should move the Court; which he did by *SERJEANT WRIGHT* last Term, to amend the declaration, and make the demise to be in the year 1696 instead of 1697.

X 4

WRIGHT,

PULSTON
against
WARBURTON
AND OTHERS.

* [333]

* WRIGHT, *Serjeant*. The declaration delivered to the tenant in possession was right, and a full defence being made at the trial, the judgment may be well entered, notwithstanding this mistake; and this is warranted by the statute of 32. *Hen. 8. c. 30.* of Repleader, which enacts, "that in all actions after issue joined judgment shall be given, notwithstanding any mispleading, lack of colour, insufficient pleading, miscontinuance, discontinuance, or misconveying of process, mis-joining of issue, &c. or any other default or negligence of any of the parties, their counsellors, or attornies;" which are large and general words, and will justify the amendment in this case. This Court has changed the plaintiff in ejectment after the declaration delivered (*a*), he being a witness to prove a deed in the cause. It has likewise enlarged the term where the cause has been long in agitation (*b*); and it was never denied to amend where there is any thing to amend by (*c*). An ejectment is an action brought by consent, and more immediately under the power of this court than any other action, for it is a matter of form set out by the court (*d*). Now the declaration below against the *casual ejector* being right, that being in nature of an *original*, in whose room the defendants are to come in by rule of court, it is plainly the misprision of the clerk, and therefore may be also well amended within the statute of 8. *Hen. 6. c. 15.* especially when the amendment is in affirmance of the judgment.

Skin. 591.

[334]

Carth. 401.

* [334]

BIRCH, *Serjeant*, SIR FRANCIS WINNINGTON, and SIR THOMAS POWYS, *contra*. If by these general words in the statute of 32. *Hen. 8. c. 30.* every thing may be amended, as it has been argued on the other side, then all motions in arrest of judgment would be vain, and to no purpose; because let there be never so many errors, either in title, substance, or form, they may be all amended; but the practice is otherwise. As to the reason offered why the Court should make an amendment in this case, because they have altered a plaintiff in the same action, that can be of little force; for it is not material who is plaintiff in ejectment, for he is only a nominal and imaginary person; and therefore judgment shall be entered against him after he is dead, because he is not concerned in interest (*e*). * This mistake was seen before the trial, and the plaintiff moved the Court twice, but they would not alter it; but yet he proceeded to try the cause, and would not have the Court make a new record, a new lease, and a new *ouster*, which could not be done without the consent of both parties. All amendments extend to forms and mistakes of clerks, but not to titles and substance, as this is (*f*). It has been said, that the Court should give

(*a*) But it was before plea pleaded.
1. Sid. 24. — See *Ld. Ray.* 771. 3. *Burr.* 1290.
(*b*) *Carth.* 3. *Comb.* 13. 50. — But see *Carth.* 401. *Comb.* 110. 1. *Salk.* 257. that it cannot be done without consent of parties.

(*c*) But see *Str.* 1211.
(*d*) 1. *Burr.* 668. 3. *Bl. Com.* 206.
(*e*) 1. *Mod. Rep.* 252.
(*f*) See 4. *Burr.* 2449. and *Runnington's Ejectments*, 105.

leave to amend this declaration, because they enlarged the term where the cause has been long depending; but, certainly, that can signify little to this purpose, because where difficulties arise, *Curia advisare vult* for two or three years together, rather than give a hasty judgment. Now that is the act of the Court, and no default of the parties, therefore they may well enlarge the term (a). It cannot be said, with any colour of reason, that this action is more under the power of this court than any other; for proceedings in ejectment are as regular as in any other cases whatsoever. In the case of *Thompson v. Leach* (b), an ejectment was brought for so many acres *ligni*, but the Court would not amend it, and put in the word "*bosci*;" and therefore the plaintiff having declared of several other things, care was taken to separate the damages by the verdict. Now this being matter of substance, it cannot be amended by the statute of 8. Hen. 6. c. 15. because that does not extend to this case, for it must be after judgment, and in affirmation of the same; and this motion is made in arrest of judgment. The latter statutes do not extend to it, but only matter of form; so that it will be difficult for the plaintiff to shew any particular provision in those acts to suit with this case. This Court denied to enlarge the term in an ejectment in the case of *Hutchins v. Bassett* (c), which was hung up many years by privilege of parliament. This is not the misprision of the clerk, and therefore it cannot be now amended in another Term. So was the law formerly held to be in an action of trespass (d) for breaking the plaintiff's close, and carrying away his goods; which words were left out of the declaration. This was not allowed to be amended in another Term, for the plaintiff is to declare at his peril. Neither can the case of *Pemble v. Stern* (e) be an authority to govern this: it was a special verdict in ejectment; and an exception was taken to the declaration, because it was of a *park*, without saying how many acres *et de pannagio*, of which an * ejectment would not lie: but the Court being divided upon another point, a rule was made to adjourn it into THE EXCHEQUER CHAMBER; and before the record was certified, SIR WADHAM WYNDHAM, one of the Justices against the judgment for the plaintiff, died; and then, there being but three Judges in court, a motion was made for judgment, according to the opinion of the other two, KELYNGE and TWISDEN, the plaintiff having released the damages for these things without the consent of the defendant, which could not be done by law; and it being opposed by WESTON, who was of counsel with the defendant, yet at last he consented to it, because he

* [335]

(a) Carth. 3. Comb. 15. 6. Mod. 58. Bro. Abr. "Amendment" pl. 130. 41.

(b)

(c) 1. Show. 537.

(d) Year Book 22. Hen. 6. pl.

(e) Easter Term 21. Car. 2. 1. Sid. 416.

PULISTON
against
WARRURTON
AND OTHERS.

saw these two Judges would otherwise give judgment against his client (a).

(a) The Court agreed, that in a judgment by confession on a warrant of attorney, it had, and might be amended, because without such amendment the agreement and intent of the parties could not be fulfilled; but denied it in the principal case, because it altered the issue and made another title. S. C. 1. Salk. 48. Therefore a new trial was had at bar

between the same parties in the Michaelmas Term following. S. C. Carth. 402.; Bennett v. Gawdy, 1. Show. 207. S. C. Carth. 128. accord.—But see Marlborough v. Skinner, 2. Stra. 890.; Aslin v. Par- kin, 1. Burr. 665.; Baker v. Cole, 3. Burr. 1161.; Hardman v. Pilkington, 4. Burr. 2447.; Roe on demise of Lee v. Ellis, 2. Bl. Rep. 940.

Case 163.

Cholmondley against Broom.

To debt on bond laid in Middlesex, the defendant may plead to the jurisdiction of the king's bench that he was commorant

within a county palatine; and such plea need not be on oath.

S. C. 3. Salk. 173.

S. C. Carth. 402.

S. C. 12. Mod.

123.

4. Inst. 212.

1. Salk. 30.

201, 202.

2. Salk. 515-543.

Lutw. 236.

Style, 225.

1. Sid. 329.

1. Saund. 97.

Comb. 582.

4. Bac. Abr. 53.

Tidd's Pra. 241.

* [336]

Case 164.

In quare impedit, if the plaintiff derive his title under letters patent from THE KING, and the defendant plead that bene et verum est that the king was seised of the advowson, and granted it THE PRIORY was dissolved, yet the plaintiff, notwithstanding his confession in the pleadings, must give some evidence that the advowson was once in THE CROWN.—Ante, 297, 298, &c.

DEBT UPON BOND was brought against the defendant in this court in custodia marischalli: he pleaded, that about the time of the exhibiting the bill he was an inhabitant in the county palatine of Chester, to wit, at Nantwich, and notoriously known there. Now this being held to be a foreign plea, and not sworn, the plaintiff for that reason signed his judgment.

MR. CHESHIRE moved to set it aside, because though it is a plea to the jurisdiction, yet it is not a foreign plea, and therefore need not be sworn. "Antient demesne," and all pleas of privilege, are pleas to the jurisdiction; but they are not foreign, and therefore they are to be received without an oath. Many instances may be given of foreign pleas, which if not collateral to the action must be received in that manner: as in an action of debt for money, if it appear upon the condition of the bond that it should be paid out of the jurisdiction of an inferior court, and the defendant plead payment accordingly, this plea must be received without an oath (a).

And for this reason the judgment was set aside.

(a) But see 4. & 5. Ann. c. 16. s. 11. Fort. 341.

The King against Jarvois.

A TRIAL AT BAR in a quare impedit for the church of Northfield, setting forth, that John Webley, late prior of the dissolved monastery of St. James the Apostle, of Dudley, in the county of Worcester, was seised of the advowson of the said * church in gross as of fee, in right of his said priory, and that he and his convent, on the ninth of June, in the twenty-first year of Henry the Eighth, granted the next presentation thereof to Ralph Bradley and others, under their common seal; that by the statute made on the fourth of February, in the twenty-seventh year of Henry the Eighth, and granted it THE PRIORY was dissolved, not having above the clear yearly profit in the declaration, yet the plaintiff, notwithstanding his confession in the pleadings, must give some evidence that the advowson was once in THE CROWN.—Ante, 297, 298, &c.

value

value of two hundred pounds, and the possessions thereof were given to the king and his heirs (a); that *Henry the Eighth* died seised, and it afterwards came to *Queen Mary*, and so on to *Queen Elizabeth*; that *Ralph Bradley*, the fourteenth of *August 1558*, which was in the last year of *Queen Mary*, granted the next presentation to *Sir Richard Levingston*, and *Edward Levingston, Esq.*; that *Sir Richard* died, and *Edward Levingston* survived, and was sole possessed; that *Queen Mary* died seised of the advowson, and the church became void by the death of *Richard Walker*, and that *Edward Levingston* presented *Henry Squire*, who was instituted and inducted; that *Queen Elizabeth* died without issue, and the advowson of the said church descended to *King James the First*, and so derives a title to his present majesty; and that the church being void, it belonged to him to present.

The defendant pleads, that *bene et verum est* that *King James* was seised of the advowson in gross as of fee, prout in the declaration; but that he by letters patents under THE GREAT SEAL, dated the eleventh of *July*, in the thirteenth year of his reign, granted the same to *Sir Charles Montague* and *Edward Sawyer*, and their heirs, the church being then full of the said *Henry Squire*; that they, on the fifteenth of *July*, in the same year, granted it to *Edward Skinner* and his heirs; that *Skinner* afterwards levied a fine to *Sir Thomas Jarvois*, and declared the uses thereof to the cognizee and his heirs; that *Sir Thomas Jarvois*, on the thirtieth *March*, in the fourth year of *Charles the First*, granted the next presentation to *Phineas White*; that the church became void by the death of *Squire*; and that *Phineas White* presented *Timothy White*, who was instituted and inducted; that *Sir Thomas Jarvois* died seised, and the advowson did descend to *Sir Thomas Jarvois*, his son and heir, and that the church became void by the death of *White*; that he thereupon presented *John Hinkley*, who was instituted and inducted; * that *Sir Thomas Jarvois* died seised, and the said advowson descended to the defendant, being his son and heir, and that the church being void by the death of *Hinkley*, he presented the defendant *Hinkley* thereunto, who was instituted and inducted; and traversed, that *King James* died seised of the advowson aforesaid modo et forma prout ATTORN. GENERAL. præd. dom. regis nunc per narration. suam præd. superius allegavit, PROTESTANDO that *Sir Thomas Jarvois* deceased and the defendant *Jarvois* were successively, for the space of sixty years and more before this writ brought, seised of the advowson in gross as of fee, and that *Henry Squire* died about sixty years before the writ brought, FOR PLEA SAITH, that *bene et verum est* that *King James* was seised, and derived a title to the defendant *Jarvois*, ABSQUE HOC that the church was void by the death of *Henry Squire*.

* [337]

THE ATTORNEY GENERAL took issue upon the traverse of *Jarvois*, which was now to be tried.

(a) 37. Hen. 8. cap. 2.

THE KING
against
JARVOIS.

The question at the trial was, Whether the defendant should give evidence, and shew how this advowson came out of THE CROWN? for having alledged, that *bene et verum est* that King James was seised, and induced his title by a grant from the king, and having traversed that the king died seised, &c. he ought to produce his grant, and shew how it came out of the crown; for the seisin of the king being confessed in the plea, *ex hoc sequitur* that he died seised.

But notwithstanding this confession in the plea, THE COURT made the plaintiff give some evidence that this advowson was once in THE CROWN.

A grant made by
A PRIOR of one
of the dissolved
prieories is not
evidence of an

advowson having been in THE CROWN. The plaintiff thereupon produced a grant of THE PRIOR made by him of the next presentation, and THE PRIORY being now dissolved, the advowson of consequence must be in the crown.

The defendant then produced his grant, which was by a warrant from the commissioners under THE GREAT SEAL for confirming defective titles.

THE COUNSEL for the plaintiff insisted, that such grant was not sufficient, because those commissioners had not an authority to make an original grant; they had only a special authority given them to supply defective titles, by confirming such grants which were already made by the king.

This commission, which is dated the twenty-fourth February, in the first year of King James, is upon record under THE GREAT SEAL; it is an express authority given to certain persons, and the grant made by them is with reference to that authority, for it is "*per warrantum commissionat.*;" therefore they must produce an actual grant from the crown. Now it appears, that the king was deceived, even upon the * very record; which makes the letters patents void without a *scire facias*, for he intended to grant nothing but what was in the possession of the party before, or for which he had some colour of a grant upon which the commission was to operate.

* [338]

Fitzg. 308.
Comb. 308.
1. Co. 45.
Skin. 659.
Carth. 351.

But IT WAS ARGUED for the defendant, that he need not shew a precedent grant, because this made by THE COMMISSIONERS was sufficient; for it shall be presumed that THE COMMISSIONERS did pursue their authority; and the possession having been in the defendant and his ancestors for sixty years and upwards, and no presentation since from the crown, it shall never be intended that those commissioners exceeded their power.

And of this opinion was THE COURT, especially since the plaintiff could not produce any evidence that the king did present to this living since the dissolution of the priory; and therefore it is possible that THE PRIOR might grant away this advowson before the statute of 37. Hen. 8. c. 8. and it might be that evidence was given of such a grant to the commissioners. These letters

patents

Easter Term, 9. Will. 3. In B. R.

patents were granted to commissioners to quiet the possessions of the people, whether the crown had any pretence or not.

THE KING
against
JARVOIS.

The plaintiff was nonsuit.

Brace against Pennoyer.

Case 165.

IN TRESPASS, there was a judgment in the common pleas against three defendants, who brought a writ of error in this court; and, before the record certified, one of the plaintiffs in error died; and after his death a *capias ad satisfaciendum* was taken out against the other two surviving without bringing a *scire facias*.

If on a writ of error on a judgment in *trespas* against three, one of the plaintiffs in error die before the record be certified, the Court, on a suggestion being made of the death, will grant execution against the survivors without a *scire facias*.

The question was, Whether there ought not first to be a *scire facias*?

* [339]

Because, as it was said, the execution varies from the judgment, and is not pursuant to the record, because there was an alteration of the persons from three to two. It is true, where one is not party to the record, as heir, executor, or administrator, he can have no execution without a *scire facias*, though it be within the year, because the alteration of the person alters the process. But it is as true, that if two plaintiffs recover, and one die before execution, the survivor may take it out without a *scire facias*, because he is party and privy to the judgment; and if it * should happen that the dead man had released the judgment, the defendant may bring an *audita querela* and be relieved (a). It is true, if one of the plaintiffs in error had died after the affirmance of the judgment, there must be a *scire facias*. In replevin, three defendants made cognizance, &c. (b) and a verdict was given for the plaintiff in Michaelmas Term, in the second year of Queen Elizabeth; one of the defendants died after the last continuance, yet judgment was given against the other two surviving without a *scire facias*. By which it appears, that execution may be taken in this case without any suggestion made on THE ROLL, and without application made to the Court.

S. C. 1. Salk. 319.
S. C. Holt, 640.
S. C. 8. Mod. 108.
S. C. Comb. 447.
S. C. Carth. 404.
S. C. 12. Mod. 430.
21. Hen. 7. pl. 16.
Moor, 367.
Noy, 151.
2. Inst. 471.
Carter, 112.
193.
1. Salk. 264.
319.
1. Show. 404.
Skin. 82. 682.
8. Mod. 108.
5. Com. Dig. (3. L. 2.).
2. Bac. Abr. 201. 360.
4. Bac. Abr. 416, 417. 419.

CURIA. A *scire facias* is not necessary upon the abatement by the death of the party; for what need is there of it, when the party cannot plead to it? If they press for a return of the writ of error, it will be certified; and without a suggestion upon THE ROLL, he had no means to know that one of the parties was dead (c). Therefore such a suggestion ought to be made (d), and then to pray execution against the survivors, *et quia super examination. constat Cur.* that one of the defendants was dead; therefore the Court does award execution against the rest.

And for this reason a *superfedeas* was awarded, *quia improvidè*.

(a) Vide 1. Salk. 264. 319.

(b) Sackville's Case, Dyer, 173.

(c) Vide 1. Lilly, 2.

(d) See 8. & 9. Will. 3. c. 11. f. 7.

TRINITY TERM,

The Ninth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* The King against Broom.

* [340]
Case 166.

THE AFRICAN COMPANY, in the year 1691, hired the ship called "THE AMERICA," whereof one *John Broom* was master, who took a *French ship* in the *West Indies*, and she was condemned there as prize, and the property was vested in THE KING. Afterwards *Broom* sold the goods in *Barbadoes*, and then came home, and he was prosecuted in THE ADMIRALTY COURT at the suit of the king; upon which prosecution there was a sentence, and an appeal was brought from that sentence.

Pending that appeal, *Broom* moved for a *prohibition*, suggesting,

FIRST, That the ship and goods were taken in the *West Indies* *infra corpus comitatús*, and so THE COURT OF ADMIRALTY had no original jurisdiction of the cause: and this was on purpose to stop the proceeding upon his own appeal.

If a ship belonging to a subject, and not having letters of marque, take a ship belonging to an alien enemy, the property by such capture is, upon its being condemned in any court of admiralty as lawful prize, immediately vested in THE KING; and therefore if the captor afterwards convert such prize to his

own use, the value may be recovered against him by suit in the spiritual court.—S. C. Carth. 398. S. C. 1. Salk. 32. S. C. Comb. 444. S. C. 12. Mod. 134. 1. Salk. 31. 2. Salk. 440. 3. Lev. 351. 6. Mod. 13. 4. Mod. 176. 2. Lev. 27. Ray. 489. Show. 29. 1. S. d. 320. 367. 2. Saund. 260. Skin. 59. Raym. 473. 1. Sid. 320. 367. 1. Lev. 243. Carth. 474. Dougl. 594. 613. *notis.* 3. Term Rep. 323. 4. Term Rep. 385.

SECONDLY,

THE KING
against
Broom.

SECONDLY, That the property being once vested in the king, by the condemnation of the ship as prize, there can be no suit afterwards in THE ADMIRALTY COURT here; for if after such condemnation the goods be converted, the king must bring an action of *trover*: and this is a plain action of *trover* upon the face of the libel.

To which it was answered, that the ship was taken without any commission or letters of marque; and therefore it is a perquisite to THE ADMIRALTY, and *Broom* is responsible to the king for the ship and goods.

There is nothing within the libel upon which to ground a prohibition.

• [341]

* FIRST, They say that the ship was taken in the *West Indies infra corpus comitatús*, which is not sufficient; for it ought to appear upon the libel, that she was taken upon the land beyond sea, because this Court takes no notice of counties there, and no prohibition after sentence shall be granted upon a bare suggestion that the captain was not *super altum mare* (a). That the property is not vested in the king by the condemnation, for that only declares it to be in him, for which he may afterwards sue in THE ADMIRALTY here; and though the goods were sold at land, and an action might be brought at law for the conversion, yet the original cause arising upon the sea, upon which this sale did depend, gives THE COURT OF ADMIRALTY jurisdiction, for the conversion was at sea, though the goods were sold at *Barbadoes* (b); and the first motion he made toward the place was a breach of trust, of which the conversion at land was an evidence. But it is too late to pray a prohibition *after sentence*, and an appeal brought (c); for it would be a great inconveniency to allow it after so much expence, and no exception taken to the jurisdiction. This is a reason given by my LORD ROLLE in his *Abridgment* (d). As for instance: By the statute 23. *Hen. 8. c. 9.* "No man is to be cited to appear out of the diocese where he liveth, except, &c. upon pain of double damages to the party grieved, and ten pounds to the king." A suit was commenced in the prerogative court for a legacy, and the party had sentence for it (e); and upon an appeal from the sentence to the delegates, the sentence was confirmed, and costs taxed, and excommunication for non-payment. Now the executors would have a prohibition upon the statute, because they dwelled in another diocese; but the Court granted

Skin. 299.
Cases in Law
and Equity, 439

(a) 3. Mod. 244. 1. Lev. 243. 286. 2. Burr. 813. Dougl. 378.
1. Sid. 367. 1. Roll. Rep. 80. 2. Brownl. 2. Term Rep. 473.
34. (d) *Friswell's Case*, 2. Roll. Abr. 319.
(b) Cro. Eliz. 685. 2. Saund. 260.
1. Sid. 320. 1. Mod. 18. 2. Salk. 540. (e) *Smith v. Executors of Poyndrell*, Cro. Car. 97.
(c) But see B. R. H. 317. 3. Mod.

Tribity Term, 9. Will. 3. In B. R.

a consultation, because they came too late for a prohibition, having so long allowed the jurisdiction of that court.

Adjournatur (a).

(a) It is said, that it was resolved by the Court, that no prohibition should go, because THE COURT OF ADMIRALTY had jurisdiction of the *original cause*, which was the *capture*, upon which the king's title immediately accrued, and as the embezzlement or conversion was immediately upon the capture, all was but one con-

tinued act, S. C. Carth. 398. ; and therefore the admiralty having jurisdiction, the sentence has bound the property, and precluded the courts of common law from examining the matter until annulled by appeal; S. C. 2. Salk. 33. S. C. 12. Mod. 135.

THE KING
against
Broom.

The King against Holroy.

Case 167.

THE DEFENDANT was indicted for concealing traitors unknown, and buying clippings. He was found guilty; and brought a writ of error, and assigned for cause, that there was a *misericordia* instead of a *capiatur*. And for this reason the judgment was reversed.

In *misdemeanor*, the entry of a *misericordia* instead of a *capiatur* is erroneous.

1. Hale P. C. 238.

* The King against Greep.

* [342]
Case 168.

THE DEFENDANT was tried for *perjury* on a trial AT BAR, upon an information at common law, setting forth, that there was a trial in the common pleas such a Term, between *Richards* plaintiff and *Cornforth* defendant. *Quodque super triation. ill. per quosdam testes adtunc et ibidem ex parte præd. ROBERTI RICHARDS in causa præd. product. et adtunc et ibidem debito modo jurat. juratoribus jurat. illius in evidenc. adtunc et ibidem dat. fuit quod præd. indentura barganiæ et vendition. geren. dat. dicto decimo quinto die Junii anno Domini millesimo sexcentesimo octogesimo primo supradicto necnon præd. indentur. relaxation. geren. dat. dicto decimo sexto d e Julii anno Domini millesimo sexcentesimo octogesimo primo supradicto sigillat. et deliberat. fuissent per præfat. nuper DUCEM ALBEMARLE tempore dat. earundem indentur. apud tunc domum mansional. ipsius nuper DUCIS ALBEMARLE co'it vocat. five cognit. per nomen de ALBEMARLE HOUSE; quæ quidem domus præd. decimo sexto die Julii anno illo fuit sitat. in paroch. SANCTI MARTINI IN CAMPIS in com. MIDDLESEX præd. Quodque quidam RICHARDUS STRODE armiger. temporibus sigillation. et deliberation. indentur. ill. fuit præsens in domo ill. cum præfat. DUCE ALBEMARLE et fuit testis præd. sigillation. et deliberation. earundem. Ac ulterius idem coron. et attorn. dicti dom. regis pro eodem domino rege dat. cur. hic intelligi et informari quod adtunc et ibidem ad triand. ill. SCILICET in præd. colab. Sanctæ Trinitatis anno regni dicti domini regis nunc octavo supradicto apud WESTMINSTER præd. in com. MIDDLESEX in præd. cur. ipsius domini regis de banco præd. ibid. quidam ROBERTUS GREEP nuper de paroch. de PLIMPTON S. MARIE in com. DEVON. yeoman product. fuit testis ex parte præd.*

An information at common law for PERJURY in a trial at bar in replevin.

THE KING
vs
GRIFF.

* [343]

præd. HENRICI CORNFORTH *defend. in causa præd. et adtunc*
ibidem jurat. fuit super sacrosanct. Dei evangelio ad dicen. verita-
tem totam veritatem et nihil præter veritatem de et in præmissis in
exitu inter partes præd. modo et forma præd. posuit. Quodque idem
ROBERTUS GREEP *Deum præ oculis suis non habens sed insti-*
gation. diabolica mot. et seduct. adtunc et ibidem per actum et
consensum suos falso malitiosè voluntariè et corruptè super sa-
cramentum suum præd. dixit deposuit juravit et juratoribus juræ
præd. in evidenc. d. et concernen. præd. RICHARDO STRODE *dedit*
quod circa medium Julii, ANGLICE "the middle of July, octoge-
*simo primo mensem Julii anno Dom. * millesimo sexcentesimo octoge-*
simo primo supradict. innuend. MAGIST. STRODE præfat.
RICHARDUM STRODE *innuendo fuit apud NEWNHAM (quandam*
domum vocat. NEWNHAM in paroch. de PLIMPTON SANCTÆ
MARIÆ in com. DEVON. innuendo); et quod circa medium Julii,
ANGLICE "July," *millesimo sexcentesimo octogesimo primo*
eundem mensem Julii eodem anno innuendo MAGISTER STRODE
eundem RICHARD. STRODE iterum innuendo fuit apud NEW-
NHAM dict. dom. vocat. NEWNHAM paroch. de PLIMPTON
SANCTÆ MARIÆ in com. DEVON. præd. innuendo; et quod circa
medium mensis Julii anno Dom. millesimo sexcentesimo octogesimo
primo MAGISTER STRODE ipsum eundem RICHARDUM STRODE
iterum innuendo fuit apud NEWNHAM (præd. domum vocat.
NEWNHAM *in paroch. præd. de PLIMPTON SANCTÆ MARIÆ*
in dicto com. DEVON. iterum innuendo), ubi revera et in facto
præfat. RICHARDUS STRODE circa medium dicti mensis Julii anno
Domini millesimo sexcentesimo octogesimo primo supradict. vel ad
aliquod aliud tempus quodcunque in dicto mense Julii eodem anno
non fuit apud NEWNHAM præd. prout idem ROBERTUS GREEP
super sacramentum suum præd. falso malitiosè voluntariè et cor-
ruptè dixit deposuit juravit et juratoribus ibidem juræ præd. eviden-
dedit, &c.

On an issue in
replevin, whether
A. died seised of
certain lands in
fee; B. the sub-
scribing witness
to a deed proves
that he saw A.
execute it in the
month of July,
at Albemarle
House, in London;
and C. swears,
that B. was

THE DEFENDANT was convicted of perjury.

AND NOW it was moved in arrest of judgment :

FIRST, For that it is not set forth that THE OATH was *mate-*
rial to the matter in issue.

SECONDLY, The fact is laid, that at a former trial *Mr. Strode*
gave evidence, that the indentures of lease and release were execu-
ted by the Duke of Albemarle, at Albemarle House, about the time
of the date thereof, which was the sixteenth day of July, in the
year 1681, and that he was then and there present with the Duke,
and was a witness that the Duke did seal and deliver the same :
commorant about the said month of July at Newnham ; this, although sufficiently material to the
matter in issue, is not a contradiction sufficiently direct to support an assignment of PERJURY ;
nor can the contradiction be rendered certain by an "innuendo, a certain dwelling-house belonging to
" the said B. at Newnham, in the parish of Plumpton, in the county of Devon ;" for the office of an
INNUEUDO is only to explain the meaning of the proposition assigned, and not to add new terms to it.—
S. C. 2. Salk. 513. S. C. Carth. 421. S. C. Holt, 535. S. C. 12. Mod. 139. S. C. Comb. 459.
S. C. 1. Ld. Ray. 256. S. C. Comy. Rep. 43. 4. Co. 44. 5. Co. 120. 2. Inst. 318. 3. Inst. 230.
9. St. Tr. 682. Sayer, 280. 4. Com. Dig. 8vo. 662. Cowp. 672. 1. Term Rep. 66.

and

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and the perjury now assigned is, that the defendant then deposed, "that about the same time *Mr. Strode* was at *Newnham* (*quand. dominum vocat: NEWNHAM in paroch. PLIMPTON S. MARIE in com. DEVON. innuendo*)."

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Now the words "about which time" are very uncertain; for if he had deposed, "*Mr. Strode* was then at *Newnham*," without saying any more, it must be agreed that had been uncertain, for it does not appear where *Newnham* * is, or that it was *Mr. Strode's* house, or in what county, or in what place. Then the *innuendo* must be the only support of this information; and that makes it worse: for the defendant swore, that "*Mr. Strode* was then at *Newnham*," which may be taken or intended any *Newnham* in *England*; and by the *innuendo* it is tied up to a special *Newnham* in *Devon*, at which place it does not appear that he swore *Mr. Strode* then was: so there being no such *Newnham* mentioned before, the *innuendo* is immaterial, for the duty of an *innuendo* is to ascertain a thing mentioned before. They should have set forth, that there was a trial, &c.; that a deed was given in evidence; that *Mr. Strode* was produced as a witness to support that deed; that he had a house in *Devon* called *Newnham*; that he deposed he saw the deeds executed in *Albemarle House* at such a time; and that the defendant swore that *Mr. Strode* was then at *Newnham*. When words spoken are uncertain, they shall not be made actionable by an averment; as to say of an attorney, "Thou hast forged writings," *innuendo* bonds and covenants (a); or to say, "that man had THE POX, *innuendo* THE French POX (b)." There ought to be a greater certainty of the place than of an addition to the party; and for this reason, Where eighteen were indicted for a riot (c), and there was no place named where seventeen of them did dwell, the indictment was quashed. In *Michaelmas Term*, in the thirty-seventh year of *Queen Elizabeth*, a man was indicted in this court upon the statute 5. *Eliz. c. 9.* for perjury (d); the indictment set forth, that there was a suit in chancery between two parties for the manor of *Staverton* in *Devon*; that a commission was awarded to examine witnesses in that cause; and that the defendant, being examined, did swear that a feoffment of the manor was delivered as an escrow, &c. *innuendo præd. manerium*. Now it did not appear that the oath which the defendant then made of the delivery of that deed did concern the manor of *Staverton* then in question; and it shall not be made more certain by the following words, "*manerium præd. INNUENDO*," because a man shall not be punished for a perjury by the help of an *innuendo*. Now though that indictment was upon the statute, yet the same reason which was then given will hold good upon an information at common law for the same offence. * Upon the whole matter, it is uncertain what *Newnham* was intended by the witness; for it is inconsistent with his evidence

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Cases in Law
and Equity, 197.
Hob. 6.
4. Co. 17.
1 Roll. 78.
Allen, 32.
Yelv. 21.

* [345]

(a) 3. Bulst. 265.

(c) 1. Bulst. 183.

(b) 1. Roll. Abr. 43. Cro. Jac. 430.
Palm. 64. Stra. 1189.

(d) Cro. Eliz. 428.

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to say, that it was *Newnham* in *Middlesex*; and the jury would have no consideration of it, unless it had been described to them by asking what *Newnham* was meant. So that, without the *innuendo*, NON CONSTAT what *Newnham* it is; for it may be a house, or a vill, or a *lieu conus*, and near *Albemarle House*; it is the distance from thence which makes the thing material. Now *Mr. Strobe* having deposed, that "on or about the middle of *July* he "was a witness to the execution of the deeds at *Albemarle House*," and the defendant having sworn "he was then at *Newnham*" generally, it may be intended the very next house to *Albemarle House*; but the *innuendo* makes it to be at *Newnham* in *Devon*, which is different from what was sworn; for the law *prima facie* intends *Newnham* to be a vill, and the *innuendo* limits it to a particular house in a parish, which alters the very signification of the word, and reduces it from a generality to a certainty. The law will not allow words to be enlarged by an *innuendo*, so as to support an action on the case for speaking them (a); à multo fortiori in cases of perjury, for that would be to convict a man of one of the highest crimes in a matter never sworn by him. This was the opinion of JUSTICE GAWDY, that a man cannot be perjured by an *innuendo* (b). And there is no authority cited on the other side to prove, that an *innuendo* will make words actionable which are not so in their own nature; but where a *colloquium* is laid, or the words of themselves are actionable, there an *innuendo* may explain them. And therefore it was agreed (c), that if a man say, "Thou hast stolen my piece," *innuendo* "my gun," the action will not lie; for though by common intentment a piece is a gun, yet it is uncertain, and shall not be helped by an *innuendo*; but if there had been any previous discourse of a gun, then the action might have been supported by the *innuendo*.

SECONDLY, Perjury must be in something material to the issue; for if it be wholly foreign and impertinent it is not perjury, but a vain and idle oath (d). In *Michaelmas Term*, in the fifth year of *James the First* (e), a man was indicted in the star-chamber for perjury committed by him in THE COURT OF REQUESTS, in giving evidence there in a cause concerning the title of lands, which was resolved by ALL THE JUDGES OF

* [346] ENGLAND not to be punishable, for it was an impertinent and not a corrupt oath, because that court has no authority to examine such titles. The oath of a jurymen is, that he shall "well and "truly try the issue between the parties:" so that if he do try any thing besides the issue it is *per non juratum* (f); and if his verdict thereupon be false it is not perjury, neither can he be attainted, because neither party is grieved thereby (g).

(a) Hob. 2. 6. 45. 1. Vent. 337. Cro. Jac. 126.

(b) Godb. 191.

(c) Godb. 339.

(d) Godb. 191.

(e) Rex v. Paine, Yelv. 111. 1. Bulst. 107.

(f) Hob. 53. 11. Co. 13.

(g) See Rex v. Dowlin, E. R. Trinity Term, 1793, where it was determined,

that stating that at such a court A. B. was "in due form of law tried upon a certain "indictment then and there depending against "him for murder," and that "at and "upon the said trial it then and there became "and was made a material question whether " &c." are sufficient averments that the perjury was committed on the trial of A. B. and that the question was material on that trial. 5. Term Rep. 311.

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IT WAS ARGUED for the king, that the *innuendo* makes the place certain enough, and that the breach of the oath is well assigned; for it is laid in fact, that *Mr. Strode* "was not at *Newnham* afore said." It is admitted, that an *innuendo* is not proper to extend words beyond their ordinary and common meaning; and likewise where a word is capable of two significations, and by an *innuendo* is tied up to one, that shall not prejudice the party: as for instance, if a man say, "I stole his corn," it may be as well standing corn as cut down (a). Neither can an *innuendo* restrain a genus, as *him* or *her* (b). Thus they who argued for the king, as well as those who had argued for the defendant, did not differ in the law concerning an *innuendo*, but only in the application of it. Now in this case the Court cannot take notice judicially, that *Newnham* is a general word, or that it has two known significations. But admitting that the place is not well explained, and that the *innuendo* was out of the case, then *Newnham* is at large, and *non constat* where it is; but be it where it will, it must be another place from *Albemarle House*. Now supposing it to be near *Albemarle House*, it is still perjury in the defendant; for *Mr. Strode* deposed, that "he was at such a time in *Albemarle House*," and the defendant swore that "he was then at *Newnham*," supposing it to be the next door. My LORD COKE, in his exposition upon the statute 5. *Eliz.* c. 9. (c), says, that if the thing sworn be not true, and not material to the point in suit, it is not perjury, because it is extrajudicial; and that act giving a remedy to the party grieved, he can in no sort be damnified if the deposition be not material to the matter in issue. * This opinion of my LORD COKE must be intended upon the statute, and it is then a little too straight; for if the thing sworn be impertinent, or do but conduce to the matter in issue, and be false, it is still perjury. But what was sworn in this case was not so immaterial to the point in issue, for it may create a belief in the jury that *Mr. Strode* was not at *Albemarle House* at that time he swore himself to be there. As to the case in *Cro. Eliz.* which has been objected, that proves nothing against this *innuendo*; it was a suit in chancery for the manor of *Staverton*, and the defendant swore that a feoffment of the manor was delivered as an escrow, when in truth it was delivered absolutely; and this was assigned for perjury in the defendant, with an *INNUENDO præd. manerium*; because he had not sworn that the feoffment was of the manor of *Staverton*, but of the manor generally; the oath was held to be immaterial to the matter in issue; it was not shewn that either party produced the feoffment at the commission, or, if it had been produced, that it concerned the manor then in question, which being so very uncertain could not be supplied by an *innuendo*; and for this exception that indictment was discharged; besides, it was an indictment upon the statute, and not at common law as

Post. 325. ;

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(a) *Barham's Case*, 4. Co. 20. a.— (b) 4. Co. 27.
See also *S. P. Castleman v. Hobbs*, Cro. (c) 3. Inst. 167.
Eliz. 428.; *Thomas v. Axworth*, Hob.
2.; *Hervey v. Duckins*, Hob. 45.

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against
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this is. But here the *innuendo* is explanatory (a), without adding any thing to the sense of the words precedent ; for it is laid, that *Mr. Strode*, being produced as a witness, did depose, that such a day in *July* he was witness to the executing of deeds in *Albemarle House*, in the parish of *St. Martin in the Fields*. The defendant swore, that *Mr. Strode* at that time in *July* was at *Newnham*, *ubi revera et in facto* he was at no time in *July* in that year at *Newnham* : and this is found by the verdict. An *innuendo* has been allowed to make a farther explanation of precedent words than in the case at bar. As in an action on the case (b) for slandering the plaintiff's title, he declared, that he was seised of the manor of *Upton Grey*, and that the defendant said he had no title to *Upton*, INNUENDO *Upton Grey* ; after a verdict for the plaintiff, this exception was taken in arrest of judgment, viz. That the words were spoken of *Upton* generally, which cannot be intended of *Upton Grey*, and so could not be helped by the *innuendo* ; but the Court was then of opinion, that it was sufficient to explain what *Upton* was intended, and so affirmed the judgment. * In the twenty-third year of *Henry the Eighth*, the *Marquis of Exeter* was indicted for these words, " I like well the proceedings of " *Cardinal Pool*, INNUENDO *Carolus Pool*, who wrote against the " king's supremacy ;" and he was convicted and beheaded.

CURIA. An information for perjury at common law, as this is, does not require so much certainty as an indictment upon the statute ; for if perjury be assigned in swearing to several interrogatories in chancery, without shewing in which, this is good at common law, but not upon the statute (c). Neither will an indictment lie for a perjury upon the statute which may be maintained at common law ; as for making a false affidavit in the chancery, or in this court (d). The statute has made the offender subject to a certain penalty, and to a corporal punishment ; and therefore the perjury must be by swearing falsely in a court of record, and in a thing material to the issue (e). But this is not required at common law ; for it is perjury to swear falsely in a court baron, or in the ecclesiastical court, which are not courts of record (f) ; nor that it should be in a thing material to the issue, for a man may be perjured in an answer in chancery to a thing not charged in the bill (g). There was a trial in which the question was, *compos vel non compos* ; the man died in *Kent*, and the witness lived in *Oxfordshire* ; at the trial he made a preface to his evidence, by telling a history of his journey, where he lay, where he dined, where he stayed on the road, and when he arrived at *London*, and so till he came to *Kent* (h). Suppose he had been indicted for perjury, in swearing that he dined by the way at *Uxbridge*, UBI

(a) Yelv. 21. Allen, 32. Cro. Eliz. 293.

(b) *Maniers v. Maynard*, Cro. Eliz. 419.

(c) 1. Sid. 107.

(d) 1. Roll. Rep. 79.

(e) 1. Hawk. P. C. ch. 69. f. 8.

(f) 2. Roll. Abr. 257. pl. 2.—See *Alexander's Case*, Cases in Crown Law, 60.

(g) *Rex v. Drue*, 1. Sid. 274.

(h)

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REVERA he did not dine there ; Is this perjury at common law ?
Certainly it is not.

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GREEN.

Adjournatur (a).

(a) The Judges, after several arguments at the bar, gave their opinions *seriatim*, S. C. 12. Mod. 139. and THE JUDGMENT was arrested by the whole Court, because the information did not shew where Newbam was except by the *innuendo*. But because the Court was satisfied that the defendant was guilty of wilful and corrupt PERJURY, he was not discharged of his bail, and leave was given to the prosecutor

to file a new information. The case, however, was afterwards removed by writ of error to the HOUSE OF LORDS ; and after hearing of counsel, when all the lords seemed to be of opinion to affirm the judgment, it was put to the vote, and the judgment was reversed by the majority without giving any reason, S. C. Ld. Ray. 261. and the defendant taken, &c. S. C. Carth 422.

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Case 169.

The King against Melling.

MELLING was found guilty of perjury at A TRIAL AT BAR. And now a motion was made for a new trial,

FIRST, Because the verdict was against evidence.

SECONDLY, Because it was against the opinion of the jury who gave it.

*The fact was thus: THE JURY found the defendant "GUILTY of perjury, but not of wilful and corrupt perjury," as it was laid in the information. And ROKEBY, Justice, being alone in court, asked the jury, Whether they found for the defendant ? They replied, "No." Upon which he told them, that he could not record the verdict which they had given, for it was contradictory, and they must find him guilty or acquit him. He asked them, Whether they believed that the matter sworn was false ? They replied, "Yes." Then he asked, Whether they believed the defendant knew it to be false ? They replied, "They could not tell that." Then the foreman said, that they agreed before they came into the court to find the defendant guilty of perjury, but not guilty of wilful, malicious, and corrupt PERJURY (a) ; and if that verdict should not be recorded, then to find him guilty generally, because some of the jury were dissatisfied to find him guilty of wilful and corrupt PERJURY. Whereupon, without any further consideration, they found him guilty generally, which is a verdict both ways, and not only against evidence but against their own opinions, which cannot be *dictum veritatis*. "was wilful and corrupt ;" yet the Court will not grant a new trial on such grounds after A TRIAL AT BAR.—S. C. 12. Mod. 128. S. C. Holt, 535. 2. Jones, 163. Ray. 170. 405. 1. Sid. 49. 153. Ray. 170. 405. 1. Sid. 153. 1. Keb. 124. 2. Keb. 403. 1. Show. 336. 1. Lev. 9. 1. Stra. 101. 3. Bac. Abr. 814. 1. Hawk. P. C. c. 69. f. 2. f. 8. 2. Hawk. P. C. c. 47. f. 12. Cowp. 37. Dough. 337. 4. Bl. Com. 354. 3. Will. 59.

On an information for perjury tried AT BAR, if the jury, believing the oath to have been falsely sworn, and not intending to find for the defendant, bring in a verdict, "GUILTY of perjury, but not of wilful and corrupt perjury ;" and, on being told by the Court that the verdict was repugnant, and could not be recorded, they find a verdict "guilty" generally, but saying, at the same time, that "some of the jurors were not satisfied that the perjury

(a) See the case of Rex v. Woodfall, Michaelmas Term 10. Geo. 3. 5. Burr. 2661. and Rex v. Daniel Isaac Eaton, Michaelmas Term 34. Geo. 3. 5. Term Rep.

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against
MALLING.

2. Lev. 140.
205.
Stiles, 462.
2. Salk. 649.

BUT THE COURT held, that when a cause is tried at BAR, a new trial is never granted for the single reason that the jury went against evidence. It is true, it was granted in my *Lord Fitzwater's Case* (a), for there was a misbehaviour in the jury, in flinging dice to decide whether they should find for the plaintiff or defendant, which would alter the trial by verdict of twelve to a trial by lot: so likewise for *excessive damages* for words; as for calling the plaintiff "traitor," and the jury giving fifteen hundred pounds damages (b).

IT WAS INSISTED on behalf of THE KING, that there was no affidavit of any misbehaviour of the jury, for they were all unanimously agreed to find the defendant guilty; but the ambiguity of the word "corrupt" puzzled them, which made them scrupulous of finding the perjury to be such, because they had no evidence of any bribery to forswear himself. Neither is it a *misdemeanor* in them to give a verdict which would have amounted to make the defendant "not guilty," and immediately, before they went from the bar, to find him "guilty." As to the first, they asked the opinion of the Court, Whether such a verdict might be received? which is what they ought to do; and if they have the opinion of the Court, that such verdict which is offered is not agreeable to law, then they are to consider what verdict to give.

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* Now it is plain, they had this matter under consideration before they came to THE BAR, because when the Judge told them he would not record the first verdict, they immediately found the defendant "guilty:" which is an argument they were fully agreed on the fact to find him "guilty," though they could not find him wilfully and corruptly guilty, because they had no evidence of it. Now to imagine this to be a *misdemeanor* is an offence and reflection upon the Court; for if there had been any misbehaviour the Judge would have told them of it. They should have opposed the receiving this verdict; but since it is recorded, they must not now set it aside. For authorities, a case in the *Year Book* (c) was cited, which was an action of conspiracy brought against two; and upon *not guilty* pleaded, the jury found one guilty, and acquitted the other, and they being advised by the Court to consider better of their verdict, which was contradictory in itself, because one alone could not conspire, they thereupon found both guilty, which is a stronger case than this at bar. It is no new thing for a jury to recall their first verdict, and for the Court to receive another at the same time (d). This was done in one *Archer's Case* (e), whom the jury acquitted upon an indictment of felony; and immediately they recollected themselves, and told the Court they were mistaken, and found him guilty; and this was entered as their verdict.

(a) 3. Keb. 555.

(b) Stiles, 462.

(c) Year Book 11. Hen. 4. pl. 2. Bro. Abr. "Conspiracy," pl. 13.

(d) See the case of Saunders v. Freeman, Plowd. 211.

(e)

E contra. New trials have been granted in this court after a conviction of perjury. It was done in the case of one *Carnelius* (a), who was indicted for perjury, for swearing that such a person was at a conventicle, when in truth he was not (b); and it appearing that the foreman of the jury who gave the verdict was owner of the barn where the conventicle was held, and being challenged for that reason, and yet sworn of the jury, the Court granted a new trial. It has been granted likewise for the miscarriage of the jury, to whom the plaintiff delivered a paper after they were gone from THE BAR (c). The law requires the evidence to be clear to convict a man of perjury, and it must be of wilful and corrupt perjury. Now when the jury was satisfied that the defendant was *not guilty* of wilful and corrupt perjury, and yet find him *guilty* generally, this is a verdict which is repugnant in itself. * They ought to find him *guilty* of "wilful and corrupt perjury," or to acquit him. In an indictment for perjury, brought upon the statute of the queen, the plaintiff declared (d), that the defendant *falso dixit et deposuit*, and shewed in what issue, and in what court, and concluded, *et sic commisit voluntarium et corruptum perjurium*; and the whole Court were of opinion, that this declaration was insufficient, because it was not said, that *falso voluntariè et corruptè dixit*, &c. for the clause which followed, *et sic commisit voluntarium et corruptum perjurium*, will not help it, because it is a conclusion upon premises insufficiently alledged (e). The Counsel for the king would excuse this *misdemeanor* in the jury by the common case of asking the opinion of the Court in a point of law, which it is their duty to do; but that is not applicable to this, for they were agreed upon two verdicts which were inconsistent, and upon the latter without any consideration at all. It is agreed, that they may vary from a *privy verdict*. The reason is, because it may be presumed that they had some subsequent consideration of the evidence after such verdict given. Besides, a *privy verdict* in strictness is no verdict; it is only a favour which is allowed to the jury for their ease.

CURIA. If the thing sworn was manifestly false, the mind must be corrupt, and then there need be no evidence of bribery.

Adjournatur.

(a) 1. Sid. 58.

(d) 3. Inst. 176.

(b) 3. Keb. 525. Jones, 163.

(e) See Cox's Case, Cases in Crown

(c) See Rex v. Jolliffe, 4 Ter. Rep. 286. Law, 65.

Stanhope *against* Smith.

Michaelmas Term, 8. Will. 3. Roll 462.

Case 170.

AN ACTION was brought upon A NOTE for money won at play. The defendant pleaded the statute 16. Car. 2. c. 7. of Gaming, and set forth, that at one sitting he lost eighty-five pounds to the plaintiff, and forty pounds more to one *Yate*. and forty pounds more from another person, is not void by the 16. Car. 2. c. 7. although both sums were lost at one sitting, for that statute intended to prevent more than 100l. being lost at one sitting to one person. — Salk. 344, 345. Lutw. 180. 3. Keb. 671. 4. Mod. 409. Ante, 1, 2. 175. 2. Bac. Abr. 623, 2. Bl. Rep. 235.

A note given for money won at play, viz. eighty pounds, to the plaintiff, and

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3. Inst. 176.

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STANHOPE
against
SMITH.

Upon demurrer it was argued, that the act made no securities void, neither was the winner to pay the treble value of the money won, unless it was above one hundred pounds, for if three men should each of them win fifty pounds, neither of them shall forfeit; for though it be more than one hundred pounds among them all, yet it is under that sum to each, and the statute makes no forfeiture but where the person winning has got above one hundred pounds at one sitting.

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* ON THE OTHER SIDE it was alledged, that in Hilary Term, 27. & 28. Car. 2. two judgments were given (a), against the pleas, to demurrers upon the like plea; and in the case of *Edgebury v. Rossindale* (b), which was upon articles concerning a horse-match, wherein the defendant agreed to run four heats at several days for forty pounds each heat; and this was held by my LORD HALE to be but one agreement, though to be run at several times, and the defendant in that case had judgment.

But in the principal case judgment was given for the plaintiff, for the statute intends a remedy where more than a hundred pounds is lost to one person, and at one sitting; for if it be lost to several, it is not within that act (c): as for instance, if a man lose ninety-five pounds to one man, and refuse to play any longer with him, and then voluntarily lose ten pounds to another at the same sitting, this shall not defeat the first person of the money which he lawfully won (d).

(a) 27. & 28. Car. 2. Rot. 109, 110. *Hodgson v. Mallen*.

(b) 2. Lev. 94. 1. Vent. 253.

(c) The same point adjudged in *Dickson v. Pawlett*, 1. Salk. 345.

(d) But now by 9. Ann, c. 14. "All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given by any person whatsoever, when the whole or any part of the consideration of such security shall be for any money or other valuable thing won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on those who do play, or for re-imbursing or repaying any money knowingly lent or advanced for such gaming or betting, or lent or advanced

"at the time and place of such play to any person so gaming or betting, shall be utterly void." And since this statute it is held, that both contract and security made or given for money won at play are void, *Robinson v. Bland*, 2. Burr. 1078; although the security be in the hands of an innocent indorsee, without notice, *Bowyer v. Bampton*, 2. Stra. 1155; *Peacock v. Rhodes*, Dougl. 614; *Lowe v. Waller*, Dougl. 716. and if the money be paid on such void security, it may be recovered back, *Rawden v. Shadwell*, Ambler, 269. But where money is fairly lent at play, this statute will not make the contract void, 2. Burr. 1082; and therefore the lender may maintain his action for it, *Barjeau v. Walkmley*, 2. Stra. 1249.

Case 171.

Toddard against Middleton.

Easter Term, 9. Will. 3. Roll 199.

On a covenant to pay for coals shipped on the *River Tyne*, a breach that they were shipped at *Tinmouth*, must shew that *Tinmouth* is on the *River Tyne*. Ante, 286. 346. — Cases in Law and Equity, 228.

AN ACTION OF COVENANT was brought upon the penalty of certain articles, wherein the defendant had agreed to pay so much a chaldron for all coals laden either at *Newcastle* or upon the *River Tyne*, and brought to *London*; and the breach assigned was, that the coals were laden on such a ship *infra portum* *Tinmouth*, must shew that *Tinmouth* is on the *River Tyne*. Ante, 286. 346. — Cases in Law and Equity,

Trinity Term, 9. Will. 3. In B. R,

de TINMOUTH, viz. at North Shields, and brought from thence to London.

TODDARD
against
MIDDLETON.

To this declaration the defendant demurred, because it did not appear that *Tinmouth* was upon the *River Tyne*, and so the breach is not well assigned, and the Court cannot take notice judicially, that *Tinmouth* is upon that river.

And for this reason they inclined against the plaintiff, but gave him leave to *discontinue* upon payment of costs, .

Maddison against Shore.

Case 172.

RAD'US MADDISON per WILLIELMUM DUNCOMB attorn. suum queritur de PATRICIO SHORE, gen. un. attorn. curiæ domini regis de banco præsen. hic in curia in propria persona sua de eo quod non reddidit ei decem libras quas ei debet et injuste detinet pro eo, VIDELICET, quod cum in statuta in parlamento domine Elizabethæ, nuper reginæ Angliæ apud Westm. in Comm. Midd. duodecimo die Januarii anno regni sui, quinto tent. edit. inter alia * inquitat. fuit auctoritate ejusdem parlamenti quod si aliqua persona, &c.

A declaration on the statute 5. Eliz. c. 9. for not appearing and giving evidence at the trial of a cause at the assizes, after subpoena delivered.

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Cumque idem RAD'US nuper scilicet termino Sanctæ Trinitatis, anno regni domini WILL'I, nunc regis Angliæ septimo in curia ejusdem domini regis nunc hic coram ipso rege eadem curia apud Westm. præd. tunc existen. implittasset quendam STEPHANUM ROTHWELL, per breve dicti domini regis de sci. fa. vic. Lincoln. direct. pro restitution. habend. de quindecim libris quas ipse antea in curia ejusdem domini regis de banco apud Westm. per judicium ejusdem curiæ de banco recuperasset versus eum pro damnis suis quæ sustinuit tam occasione cujusdam transgressionis eidem STEPHANO per ipsum RAD'UM nuper illat. quam pro misis et custagiis suis per ipsum circa sectam suam in ea parte apposuit. Quod quidem judicium idem rex in curia sua coram ipso rege apud Westm. præd. ob errores in recordo et processu inde compert. revocasset et adnullasset; per quod consideratum fuit in eadem curia dicti domini regis coram ipso rege apud Westm. quod idem RAD'US ad omnia quæ ipse occasione judicii præd. amisisset restitueretur, et idem dominus rex nunc in dicta curia sua coram ipso rege ex parte ipsius RAD'I acciperet quod ipse post judicium præd. redditum fuit et ante revocation. ejusdem, SCILICET, 20 die Junii, anno regni ejusdem domini regis 3º apud WRAGSBY, in com. Lincoln præd. solveret præd. STEPHANO præd. quindecim libras per eundem STEPHANUM versus ipsum RAD'UM ut præfertur recuperat. in plena satisfactione et exoneratione damnor. præd. prout in eodem brevi de scire facias plenius continetur. Quod quidem breve de sci. fa. præd. STEPHANUS præd. termino Sanctæ Trinitatis, anno septimo supradicto in præd. curia domini regis coram ipso rege apud Westm. præd. comparen. placitabat in barram sive præclusionem hujusmodi restitution. versus eum

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eum habend. quod præd. RAD'US post iudicium præd. reddit, et ante revocationem ejusdem non solvit eidem STEPHANO præd. quindecim libras modo et forma prout per dictum breve de sci. sa. superius suppo'it fuit; et de hoc posuit se super patriam. Et præd. RAD'US filiter id præcept. fuit vic. com. Lincoln. quod venire faciat coram domino rege a die Sanctæ Trinitatis in tres septimanas ubicunque, &c. duodecim, &c. per quos, &c. et qui nec, &c. ad recogn. &c. quia tam, &c. idem dies dat. fuit partibus præd. &c. Ad quem diem coram dom. rege apud Westm. ven. tam præd. RAD'US quam præd. STEPHANUS per attorn. suos præd. et vic. com. Lincoln. mis. inde breve de venire facias in omnibus servit. et execut. una cum pannello de nominibus ju'ra quorum null, &c. Ideo præcept. fuit vic. com. Lincoln. præd. qd. distring. jur. præd. per omnes terras et catalla, &c. et quod de exit, &c. ita quod habeat corpora eor. coram domino rege a die S. Mich'is in tres septiman. * ubicunque, &c. vel coram justitiariis domini regis ad assisas in com. Lincoln. capiend. assign. si prius die Lunæ decimo quinto die Julii apud castrum Lincoln. in com. præd. per formam statuti, &c. ven. pro defectu jur'. &c. prout per record. et process. inde in dicta curia dicti dom. regis coram ipso rege apud Westm. præd. residet. plenius apparet. Cumque nuper hic idem RAD'US eodem termino Sanctæ Trinitatis anno supradicto prosecut. fuisset extra eandem curiam dicti domini regis breve de subpæna præfat. PATRICIO et cuidam JOHANNI DOE direct. per quod quidem breve eisdem PATRICIO et JOHANNI præcept. fuit quod omnibus aliis prætermisissis et excusationibus quibuscunque cessan. in propriis personis, &c. Quod quidem breve de subpæna idem RAD'US postea et antea præd. assisas, scilicet, 13 die Julii, anno 7 supradicto, apud castrum Lincoln. eidem PATRICIO deliberavit, ac duos solidos et sex denarios pro ejus custagiis et oneribus in hac parte sustentan. eidem PATRICIO solvit; qui quidem duo solid. et sex denar. fuer. sufficien. pro custagiis et oneribus ipsius PATRICII secundum distantiam locorum vocation. et statum ipsius PATRICII, ac licet ad præd. assisas præd. die Lunæ decimo quinto die Julii apud castrum Lincoln. in com. præd. tent. coram JOHANNI POWELL milite, adtunc un. baron. Scaccarii dicti domini regis et GEORGIO DODSON ar. eidem JOHANNI POWELL associat. et NICH'O LECHMERE mil. al. baron. Scaccarii dicti domini regis justitiar. ipsius domini regis ad assisas il. in com. Lincoln. capiend. assign. per formam statuti hac vice associat. præsentia præd. NICH'I LECHMERE non expectat. Virtute brevis dicti domini regis de Si non omnes, &c. vener. tam præd. RAD'US per attorn. suum præd. quam præd. STEPHANUS per RICHARDUM MILNER, attorn. suum et jur. juratæ illius exact. similiter venerunt, et ad veritatem de exit. præd. inter ipsos RAD'UM et præfat. STEPHANUM jurat. dicend. electi triat. et jurat. fuer. præd. tamen PATRICIUS statut. præd. minime ponderan. nec pænam in eodem content. veren. coram præfat. justitiariis ad assisas præd. prædicto die Lunæ decimo quinto die Julii apud castrum Lincoln. præd. juxta exigentiam præd. brevis

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brevis de subpœna non comperuit ad notitiam suam in causa præd. dicend. nullum adtunc habend. legitimum seu rationabile obstaculum sive impedimentum in contrarium inde, sed adtunc et ibid. in causa præd. jurari, et notitiam suam inde dicere juxta tenorem ejusdem brevis default. fecit contra formam statuti præd. per quod præd. RAD'US exit. ill. ex parte sua jur. jurata illius pro defectu testimonii præd. PATRICII SHORE probare non potuit nec sectam suam præd. versus præfat. STEPHANUM ulterius prosequi; sicque idem RAD'US magnopere gravat. et multipliciter deteriorat. fuit; per quod vigore statuti præd. actio accrevit eidem RAD'O ad exigend. et habend. de præfat. * PATRICIO præd. decem libras præd. tamen PATRICIUS licet sæpius requisit. præd. decem libras eidem RAD'O nondum reddidit, sed il. ei hucusque reddere omnino contradixit, et adhuc contradic. unde dicit quod deteriorat. est et damnum habet ad valentiam centum librarum, et inde petit remedium, &c.

MADDISON
against
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Maddison against Shore.

Cafe 173.

THIS was an action of debt brought upon the 5. Eliz. c. 9. for not appearing and giving evidence at THE ASSIZES, being served with a subpœna for that purpose. Upon nil debet pleaded, there was a verdict for the plaintiff.

In an action on the 5. Eliz. c. 9. the delivery of the ticket is a sufficient service of the subpœna within the act. S. C. Comb. 449. 458. Cro. Eliz. 130. Cro. Car. 522. Stra. 510. 1150. 1154. Ld. Ray. 1529. Dougl. 558.

It was moved in arrest of judgment,

FIRST, That it did not appear by the declaration, that the subpœna was left with the defendant; for the delivery of the ticket, and reading the writ, is no good service.

But this exception was over-ruled, for the plaintiff shewed that he delivered the very writ of subpœna to the defendant himself; but the delivery of a ticket containing the substance of the writ, is a sufficient service within the act.

SECONDLY, It was objected, that the plaintiff had not set forth any special damage which he had sustained by the negligence of the defendant in not appearing to give evidence, as that he was non-suited, or could not proceed to trial for want of the defendant's evidence; for the action is given to the party grieved; and if the plaintiff be not grieved, he cannot bring this action.

A declaration on 5. Eliz. c. 9. for not appearing to a subpœna, must state the special damage the plaintiff received, although it demand only the penalty.

IT WAS INSISTED for the plaintiff, that the action being only brought for the ten pounds, and not for any more damages, the declaration was well enough.

S. C. 1. Salk. 206.

But the court of common pleas held the declaration to be ill for this last objection; because there must be a party grieved, otherwise there is no cause of forfeiture; and there must be a particular damage set forth, though this was contrary to a judgment in the like

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like case, in the reign of queen *Elizabeth* (a), where the like exception was taken and over-ruled.

Afterwards a writ of error was brought on this judgment, but it was affirmed.

(a) Cro. Eliz. 130. 1. Leon. 122.

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Case 174.

* Vinkestone against Ebden.

Count in trover
for an anchor,
sails, and three
cables.

S. C. 3. Ld.
Ray. 148.

CITY OF YORK, } BE it remembered, that heretofore, to wit,
to wit. } in the Term of *Easter* last past before the
lord the king at *Westminster* came *Hubert Vinkestone* by *Geoffry Vibergh* his attorney, and brought here into the court of the said lord the king then there his certain bill against *James Ebden* in custody of the marshal, &c. of a plea of trespass upon the case; and there are pledges of prosecuting, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit, City of *York*, to wit, *Hubert Hinkestone* complains of *James Ebden* in custody of the marshal of the *Marshalsea* of the lord the king, being before the king himself, for that, to wit, that whereas the said *Hubert* on the last day of *August*, in the 7th year of the reign of the lord *William*, now king of *England*, &c. was possessed of one anchor, and six sail-cloths and three cable ropes, of the value of ten pounds of lawful money of *England*, as of his own proper goods and chattels; and the said *Hubert* being so possessed thereof, afterwards, to wit, the same day and year at the city of *York* aforesaid, casually lost the said goods and chattels out of his hands and possession; which said goods and chattels afterwards, to wit, the first day of *October* in the 7th year aforesaid, at the city of *York* aforesaid, came to the hands and possession of the said *James*, by finding: nevertheless the said *James*, knowing the goods and chattels aforesaid to be the proper goods and chattels of him the said *Hubert*, and of right to belong and appertain to him, yet contriving craftily and subtilly to deceive and defraud him the said *Hubert* of the goods and chattels aforesaid, hath not delivered the said goods and chattels to the said *Hubert*, although afterwards, to wit, the same day and year last-mentioned, at the city of *York* aforesaid, he was requested by him the said *Hubert*, but afterwards, to wit, the same day and year last-mentioned, at the city of *York* aforesaid, converted and disposed of the goods and chattels aforesaid to his own proper use, to the damage of him the said *Hubert* of fifty pounds; and thereupon he brings suit, &c.

Imparlance.

And now here at this day, to wit, *Wednesday* next after three weeks of *Saint Michael* in this same Term, until which day the said *James* had leave to imparl to the bill aforesaid, and then to answer, &c. come as well the said *Hubert Vinkestone* by his attorney aforesaid, as the aforesaid *James Ebden* by *Henry Clarebrough* his attorney, and the said *James* defends the force and injury when, &c.

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&c. and saith that he is not thereof guilty; and of this he puts himself upon the country, and the aforesaid *Hubert* likewise, &c. Therefore let a jury come before the lord the king at *Westminster*, on *Wednesday* next after eight days of the Purification of the Blessed Virgin *Mary*; and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid there, &c. at which day the jury between the parties aforesaid of the plea aforesaid was thereupon respited between them here until *Wednesday* next after fifteen days of *Easter* then next following, unless the justices of the said lord the king, assigned to take the assizes in the city aforesaid, by form of the statute, &c. on *Wednesday* the 11th day of *March*, at the *Guildhall* of the city of *York* aforesaid, shall first come. And now here at this day come as well the aforesaid *Hubert Vinkestone* as the aforesaid *James Ebden* by their attornies aforesaid, and the aforesaid justices before whom, &c. have sent here their record in these words, (to wit,) Afterwards, on the day and at the place within contained, before *John Turton, Knight*, one of the barons of the exchequer of the lord the king, and *Thomas Hæstetyn, Esq.* to the same *John Turton* and *Edward Nevill, Knight*, one of the Justices of the said lord the king of the bench, assigned to take the assizes in the county of the city of *York*, by form of the statute, &c. being associated for this turn by virtue of the writ of the said lord the king of *Si non omnes, &c.* came as well the within-named *Hubert Vinkestone* as the within-written *James Ebden*, by their attornies within-contained; and the jury, whereof mention is within made, being called likewise came, who being chosen, tried, and sworn to speak the truth concerning the matter within contained, say upon their oath, that the aforesaid *Hubert* within-mentioned, at the time within-written in the declaration within-mentioned, was possessed of the goods and chattels in the declaration of him the said *Hubert* within specified, as of his own proper goods and chattels. And the said jurors upon their oath further say, that the town of *Newcastle upon Tyne* is an ancient town, and that the port of *Newcastle upon Tyne* is an ancient port, under the care, conservation, and government, of the mayor and burgesses of that town; that by the custom within the same town, from time whereof the memory of man is not to the contrary, the mayor and burgesses of the said town, at their own proper costs and charges, have been used and accustomed, and are obliged to repair and cleanse the port, and to render it convenient for the safe and secure navigation and remaining of the ships there; and that in consideration thereof the mayor and burgesses of the town aforesaid, for all the time abovesaid, have had and received, and have been used and accustomed, and ought to have and receive, a duty or toll of five-pence by the chaldron for all coals exported from the port aforesaid, or put and loaded in or upon any ship with an intention to be exported, and that the officer called the water-bailiff of the said town of *Newcastle* for the time being, or his deputy, from the time

VINKESTONE
against
EBDEN.

Not guilty.

Nisi prius.

Special verdict.

VINKESTONE
against
EDDEN.

time aforesaid hath distrained, and hath been used and accustomed to distrain any goods and chattels whatsoever distrainable by law of any person's whatsoever exporting or loading upon a ship to be exported, the goods and merchandizes aforesaid, and refusing to pay the duty or toll aforesaid, for non-payment of the said duty or toll. And the jurors aforesaid upon their oath further say, that the aforesaid *Hubert*, before the said time within specified in the declaration within-written, loaded a certain ship of him the said *Hubert*, called *The William and Thomas of Lyme*, with fifty chaldrons of coals of the value of twenty-seven pounds and ten shillings, within the port of *Newcastle* aforesaid, with an intention to export those coals from the said port. And the said jurors upon their said oath further say, that the aforesaid *James*, at the same time when, &c. within-mentioned in the declaration within-written, and long before, was the officer of the said town and port called the water-bailiff, constituted in due manner by the mayor and burgessees aforesaid; and the same *James*, finding the ship aforesaid loaded with the said coals as aforesaid ready to be exported, asked and demanded of the said *Hubert* the said duty or toll for the said coals, and the said *Hubert* absolutely refused to pay the said duty or toll, and thereupon the said *James*, for and in the name of a distress, took and yet detains the goods and chattels within-mentioned in the declaration within-written, being part or parcel of the tackle belonging to the said ship, for the non-payment of the said duty or toll. And the said jurors upon their said oath further say, that the goods and chattels within-mentioned in the declaration within-written, at the time of the taking thereof were worth seven pounds ten shillings. But whether upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the said goods and chattels are in such case distrainable by the law of the land, or not, the jurors aforesaid are wholly ignorant, and thereupon pray the advice and consideration of the court here: And if, upon the whole matter aforesaid, in form aforesaid found, it shall seem to the Court here that they are not distrainable in such case, then the said jurors say upon their said oath, that the said *James* is guilty of the premises within laid to his charge, in manner and form as the aforesaid *Hubert* within thereof complains against him; and then they assess the damages of him the said *Hubert*, by the occasion within-written, besides his costs and charges by him laid out about his suit in this behalf, to seven pounds ten shillings, and for those costs and charges to forty shillings: but if upon the whole matter aforesaid, by the said jury in form aforesaid found, it shall seem to the Court here that the said goods and chattels are distrainable by law in such case, then the jurors aforesaid upon their said oath further say, that the aforesaid *James* is not guilty of the premises within laid to his charge, as he the said *James* within by pleading for himself hath alledged. And because the court of the said lord the king now here are not yet advised, &c.

* Vinkestone against Ebdon.

Case 175.

TROVER AND CONVERSION for an anchor, six sail-cloths, and three cable-ropes.

If a corporation be entitled to a toll of five-pence a chaldron on all coals shipped at a certain port, the tackle of the ships on which such coals are laden, or the coals, may be distrained, at the election of the party, for the non-payment of the toll.

- S. C. 1. Salk. 248.
- S. C. Carth. 357.
- S. C. 12. Mod. 216.
- S. C. Holt, 674.
- S. C. 1. Ld. Ray. 384.
- S. C. 3. Ld. Ray. 217.
- 1. Sid. 348. 409. 454.
- 1. Mod. 47. 77. 104.
- 2. Mod. 99. 102.
- 1. Vent. 71.
- 2. Vent. 50.
- 2. Lev. 96.
- 3. Lev. 260.
- 37. 424.
- 2. Stra. 1228.
- 1. Bac. Abr. 677.
- 2. Bac. Abr. 108.

Upon *not guilty* pleaded, a special verdict was found, that the town of *Newcastle* was, time out of mind, an ancient vill, in which there was an ancient port; that the mayor and burgessees of the said town have, time out of mind, cleaned and maintained the said port for the safe navigation of ships, and for the benefit of exportation; that, in consideration thereof, they, and all those, &c. have, time out of mind, &c. received the toll of five-pence for every chaldron of coals exported, or intended to be exported, out of the said port. They find that the plaintiff loaded a ship with fifty chaldron of coals; and that he refused to pay the said toll. They find that the defendant was under-bailiff, and servant to the town of *Newcastle*, who distrained the goods in the declaration mentioned, for refusing to pay the toll. They find also, that the said goods were part and parcel of the tackle of the ship. Then they conclude, that they know not whether the said goods are liable, or not, to be distrained for the duty, which they submit to the Court; if they are not, then they find for the plaintiff; but if otherwise, for the defendant.

The single point was, Whether the tackle of the ship may be distrained for this duty? or, Whether they ought not to distrain the coal?

THOSE WHO ARGUED for the plaintiff held, that the tackle were not distrainable, because they are necessary to carry on the trade of sailing, by which the owner of the vessel gets his livelihood, and are therefore privileged. The statute 51. Hen. 3. st. 4. (a) prohibits people to distrain *averia carruce*; and this, my LORD COKE says (b), is agreeable to the civil law, which commands, that *executio non fiat in boves aratra aliave instrumenta rusticorum*, because they are of public use and benefit. And for this reason, neither a mill stone (c) nor a smith's anvil are distrainable (d); for if that should be allowed, it would be a great hindrance to those men who use those respective trades; and for this * reason the horse of a carrier is privileged: and there is no difference as to this matter, between a carrier and the master of a ship, whose tackle should be likewise privileged for the same reason. When a distress is taken for a toll, such things ought to be distrained upon which the duty arises, but in this case the prescription must be void, because no duty at all is to be paid; for by MAGNA CHARTA, and other statutes, the subject has liberty to go and come upon the sea without being disturbed. Now if the defen-

* [360]

(a) Statute Westm. 2d. c. 18.

Bro. Abr. 23.

(b) 2. Inst. 133.

(d) 2. Roll. Rep. 202.

(c) Year Book 14. Hen. 8. pl. 25.

VINKESTONE
against
EADEN.

dant will prescribe for a toll upon the sea, he must lay a very good consideration to intitle himself to such duty (a), because it is against the liberty of the subject; but the consideration here laid is not sufficient; it is only for cleansing and maintaining a port which is for the public good of the subject, and the king is the governor of all the ports; and therefore, where the like prescription was made for maintaining a wharf or quay, the Judges inclined that it was void, because it was not a sufficient compensation to the subject to deprive him of the benefit of the law (b).

Two things are to be considered, where a distress is taken for a toll: FIRST, That the distress may be returned in the same condition in which it was taken: And SECONDLY, That it may be made upon such things which may be impounded, that a *replevin* may be made thereof, according to the course of the common law of this realm (c): neither of which can be done in this case; for when the ship is once replevied, and at liberty to sail, she cannot be returned in the same condition as when distrained, because the tackle may be damaged by the weather, and no man will be security for it when she is about to sail to another land. It cannot be objected, that here was any necessity for such a distress, because it is not found in the verdict, that this ship was like to sail out of the river. * And although the jury have found, that there is a *custom* in the town of *Newcastle*, for the mayor and burgesses to repair and cleanse the port, and in consideration thereof to take a duty of five-pence for every chaldron of coals exported, &c. yet this is an outrageous toll, and therefore unlawful; for the coals there are not worth more than eleven shillings a chaldron. The statute of *Marlbridge* (d) requires, "that reasonable distresses shall be taken, *et non minus graves propter excessum;*" and therefore it has been adjudged, that where a lord distrained two or three oxen for one shilling, the party grieved might have an action upon that statute for the excessive distress (e).

BUT ON THE OTHER SIDE it was argued, that many things are privileged from a distress, as the horse upon which a man rides, or a carrier's horse, and a horse at a smith's shop, cloaths at a *taylor's*, because it is not agreeable, that the rent of a stranger should be paid by such things; but this must be understood where there is other goods sufficient to be distrained; but if such are not to be found, then even the beasts of the plough are to be distrained; for *Si summa quæ requiritur non ex aliis exurgit, nec arantibus parcendum est* (f). Now, though it be generally true, that no man shall be distrained by the utensils of his trade, yet that must also be intended where there are goods, or other beasts, enough to be distrained, and nothing besides the rigging of the ship could

Co. Lit. 47.
14. Hen. 8. 25.
3. Com. Dig.
"Distress." (C).

(a) Moor. Rep. 104.

(b) 2. Roll Rep. 265. See also Cowp 47.

(c) Fitz Abr. "Averry," pl. 192.

(d) 20. Edw. 4. c. 3.

(e) See Hutchins v. Chambers, 1.

Burr. 579.

(f) Co. Lit. 47. 2. Inst. 132. Dyer,

312.

Trinity Term, 9. Will. 3. In B. R.

be distrained; for the coals are put under-board, and not to be come at. It would be altogether as inconvenient to bring an action of debt against the master, because trade will be as much prevented if the master be arrested, as if the rigging of the ship be distrained; for she can sail no more without a pilot than without sails. Besides, in the case of sea-faring men, this is the most proper remedy; for no duty arises till the ship is about to fail. * Then as to the *consideration*, it is sufficient to entitle the plaintiff to this duty; for though it is convenient that the ship should sail, it is inconvenient that she should sail into a neglected port. The admiralty have the proper jurisdiction to take care of sailing, and it is usual in that court to take out process against the sails, which may intimate, that such a thing may be done at common law.

VINKESTONE
against
EEDEN.

* [362]

CURIA. This is not distrainable of *common right*, but by *custom*, which is laid to be as large as the common law. There is a difference between the distress which is allowed by the law for *rent*, and for a *toll* (a), as in this case.

Adjournatur (b).

(a) 3. Lev. 260. Cro. Eliz. 549. 596.

(b) In Michaelmas Term, 10. Will. 3. judgment was given for the defendant, S. C. 1. Ld. Ray. 386. S. C. Carth. 359. for by HOLT, Chief Justice, the duty arises

from the goods loaded on board the ship with which the master is chargeable; and therefore the ship and every thing there of the master's is chargeable as well as the goods. S. C. 1. Salk. 249.

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MICHAELMAS TERM,

The Ninth of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

* Memorandum.

* [363]

Case 176.

HATSEL, *Serjeant*, was in this Term made a baron of *1. Ld. Ray. 150.* the exchequer, in the place of *BLENCOWE, Baron*, who was removed into the court of common pleas.

The King *against* Cook, Snatt, and Collier.

Case 177.

THE DEFENDANTS were found guilty upon an indictment for the following crime:

That *Sir John Friend* and *Sir William Perkins* were convicted for HIGH TREASON in conspiring the death of the king; and the defendants being present with them at the place of execution, did all of them lay their hands on *Sir John Friend*, who shewed no repentance for the crime for which he was about to die, and *Cook* pronounced the ABSOLUTION, and *Snatt* and *Collier* said *Amen*. That they all three likewise laid their hands on *Sir William Perkins*, who was likewise impenitent of this crime, and *Collier* pronounced the ABSOLUTION, and *Cook* and *Snatt* said *Amen*. And that they all assisted in and assented to the said absolution.

To absolve, or to aid and assist in absolving, at the place of execution, persons condemned for high treason, is a misdemeanor; for it impliedly encourages rebellion.

S.C. Comb. 382.

3. Mod. 52.

1. Hawk. P. C.

c. 23. l. 2. c. 17.

Michaelmas Term, 9. Will. 3. In B. R.

THE KING
against
COOK, SNATT,
AND COLLIER.

The jury made a special conclusion in their verdict, Whether the laying on the hands of three, and but one at a time pronouncing the absolution, makes them all guilty of the whole matter?

Adjournatur.

* [364]

Case 178.

Riccards against Corneforth.

In replevin, if the defendant avow the taking on the 26. September as a distress for two years and a half rent in arrear at the Michaelmas ensuing, the judgment is erroneous; for the distress is for half a year's rent more than was due; but he might have abated his own avowry for the half year before judgment, and had judgment or the residue.

S. C. 2. Salk. 580.
S. C. Com. Rep. 42.
S. C. 1. Ld. Ray. 255.
Cro. Jac. 473.
1. Roll. Rep. 77.
Moor, 281.
Hob. 133. 208.
Espinaffe, 357.
5. Term Rep. 243.

WRIT OF ERROR upon a judgment in the common pleas for taking several cattle, in the declaration mentioned, on the twenty-sixth day of September, in the seventh year of William the Third, in the parish of Enfield.

* The defendant made cognizance as bailiff to RALPH Earl of Mountague and Elizabeth his wife, and sets forth, that the Duke of Albemarle was seised in fee of the lands in which, &c. and, being so seised, demised the same to John Bathurst for twenty-one years, under the yearly rent of one hundred and forty pounds payable at Lady-Day and Michaelmas; that the Duke, being so seised of the reversion, died on the fourteenth day of July, in the year 1687, make his will, and devised the reversion to the Duchess; that the Duke died, and that the Earl has since married the Duchess; et quia three hundred and fifty pounds *de redditu præd. super dimissionem præd. superius reservat. pro duobus annis et dimid. unius anni post mortem præd. DUCIS, finit. ad Festum S. Mich. Arch. ult. præterit. eisdem RAD'O COMITI MOUNTAGUE, et ELIZABETHÆ uxor. ejus, tempore quo, &c. aretro fuerunt et insolut. idem the defendant, ut ballivus præd. RAD'I COMITIS MOUNTAGUE, et ELIZABETHÆ uxoris ejus, pro præd. three hundred and fifty pounds de reddit. præd. made cognizance.*

The plaintiff pleaded in bar, and said, that before the Duke made his will he executed a lease and release of these lands to the Earl of Bath in tail, and traversed that the Duke died seised:

Upon which they were at issue, and the defendant had a verdict.

The error assigned was, that the declaration was of Hilary Term in the seventh year of William the Third, which was in the year 1695, and the avowry and pleadings are of the same Term, and the taking is laid to be twenty-sixth September in the seventh year of William the Third, which was likewise in the year 1695; that the defendant justified the taking, because three hundred and fifty pounds rent was in arrear for two years and a half, *finit. ad Festum S. Mich. Arch. ult. præterit.* which must be Michaelmas 1695; and that Michaelmas rent was not due at the time of the taking the cattle, which was on the twenty-sixth of September: so that the defendant had avowed for half a year's rent after the distress was taken, and for this reason the judgment was erroneous.

But

BUT on the other side several authorities were cited to prove that so much certainty is not required in an *avowry* as in a *declaration*; for though an *avowry* is in some sort a declaration, yet it is not so in *omnibus*; for the avowant is a defendant, and the law allows him more favour than a plaintiff in an action, who is to make out a title to the thing in demand; and therefore his declaration must be certain. In declarations there can be but one point in issue; but in an *avowry* there may be two, as for rent upon two demises, and if one be found for the avowant, he shall have a *return. habend.* * If the avowant be not intitled to the whole rent for which he distrained, yet he shall have a return for so much as is in arrear. It is true, the Book says (a), "that the quantity of the rent must be agreed in the pleading, and then if a dispute happen, how much is in arrear, and the defendant avows for more than is due, he shall have a return." So where the defendant avowed for a rent (b), and a *nomine pænæ* for non-payment of it, but laid no actual demand of the rent, the *avowry* was adjudged ill for the penalty, because it could not be forfeited without an actual demand of the rent; but the plaintiff in replevin had a return (c), for he had good cause to distrain for his rent.

In the case of *Goodman v. Ayling* (d) the Court made a distinction between a *replevin* and a *trespass*: It was an action of trespass for entering his house, and taking a chafing-dish; the defendant pleaded, that the house was parcel of a half-yard land, held of the *Earl of Northumberland*, as of his manor of *W.* by homage, fealty, incertain escuage, suit of court, inclosing of the park with pale, and a pound of cummin rent, and justified his entry and taking for the rent; the plaintiff replied, that it was held of another lord, and traversed that it was held of the *Earl modo et formâ*; the jury found, that it was held of the *Earl* as of his manor of *P.* (which was not the name set forth in the *avowry*) by homage, fealty, inclosing of the park, and the rent of a pound of cummin, *et non aliter*. Here the verdict did in no sort agree with the plea in the tenure, yet judgment was given for the defendant; and the reason was, because it was an action of trespass, in which the substance of the matter in question was found, and which was sufficient to excuse the trespass, *viz.* the taking for the rent; and that the house was held of the *Earl*: and though it was said in that case, that it would have been otherwise in an *avowry*, for the avowant ought to make out a title in *omnibus*, because the plaintiff in replevin is to have a return (e) yet that is not an authority against the case at bar, but agrees with it; for this avowant has demanded but one thing, which is rent, and which is found to be due, though not so much as mentioned in the declaration: and the true reason why an avowant for services must make out a title to all, is, because if it be found for him, it will

RICCARDS
against
CORNEFORTE.
Comb. 27. 472
476.
Carth. 122. 779.
2. Mod. 54.

* [365]

(a) Moor, 281. in the 8th resolution in the Case of *Battey v. Trevilian*.

(b) *Howell v. Sambach*, Hob. 133.

(c) *Brown v. Dunnery*, Hob. 208.

(d) *Yelv.* 148.

(e) *Cro. Eliz.* 799.

RECORDS
against
CORNEFORTH.

* [366]

Carth. 254. 386.
1. Vent. 103.
Hob. 189.
Moor, 887.
2. Cro. 115.

Comb. 307.
Skin. 326.

be a perpetual charge upon the tenant; but in an avowry for several sums of money due for rent, it is sufficient if the substance be found, viz. that rent is in arrear, though not so much as in demand. * It has been objected, that if a man distrain for rent due at several days (a), which distress is rescued, and, in an action of rescous brought, it appears, by his own shewing, that one rent is passed, but the other is not, at the time of the distress taken, and a verdict for the plaintiff, and damages intire, the plaintiff shall never have judgment for the damages he sustained by rescuing those cattle from him which he had taken for rent before it was due. So in *assumpsit* (b), if two breaches be assigned, and one is ill assigned, and a verdict for the plaintiff, and damages entire, he shall never recover, because damages are intended as well for the breach which is ill assigned as for the other which is well: from whence they would infer, that in replevin, as this case was, because the defendant had avowed for more rent than was due, and damages entire, the judgment ought to be reversed. But damages in an avowry are not given in respect of the rent for which the distress was made, but for taking the cattle, and are given to the defendant by the statute 21. Hen. 8. c. 19. in such manner as the plaintiff should have if he had recovered, which must be for taking the cattle, and not otherwise, and so shall not vitiate this judgment.

IT WAS LIKEWISE OBJECTED, that by the judgment in *replevin* the return ought to be irreplevifable; so the defendant, having distrained more than will satisfy the rent really due at the time of the distress taken, shall retain the surplus by virtue of this judgment for rent which was not then due.

BUT IT WAS ANSWERED, that if the value of the cattle be less than the rent really due, that will be a sufficient answer to this objection. The cattle now taken were of the value of forty pounds, and no more, and the rent then due was two hundred and forty pounds.

BUT THE COURT reversed the judgment principally for this reason, and said, that the avowry, *quoad* the last half year's rent, should have been abated, because it was not due till three days after the distress made, and for which the defendant avowed (c). Now by the judgment in this action (the verdict being for the defendant) the cattle taken by him are for ever afterwards irreplevifable for two years rent and an half, when, upon tender of the two years rent, the man should have his cattle again, which were kept for such rent for which they were not * taken, for it was due after the distress.

* [367]

Judgment reversed *nisi* (d).

(a) Year-Book 9. Hen. 7. pl. 3.

(b)

(c) But see 5. Term Rep. 248.

(d) But it appearing to be the mistake of the attorney, the avowry was afterwards amended in the court of common

pleas, S. C. Comy. 42.; and the Roll altered accordingly in the court of King's bench, S. C. 2. Salk. 580. and upon these amendments the judgment was affirmed, S. C. 1. Ld. Ray. 256.

Anonymous.

Anonymous.

Case 179.

NOTE. By a private act of parliament it was enacted, "that if a trial be had between two inhabitants of Newcastle upon Tyne, and the damages not exceeding forty shillings, that in such case the plaintiff shall have no judgment, but the defendant shall have costs."

An *indebitatus assumpsit* was brought, and a verdict for the plaintiff, and thirty shillings damages.

The question was, How the defendant should have his costs?

And now a motion was made, that this matter might be suggested on **THE ROLL**.

But **HOLT**, *Chief Justice*, said, that the judge of the inferior court should have directed the jury to find for the defendant.

If a statute enact, that if damages be under 40s. the plaintiff shall not have judgment, but defendant shall have costs; the verdict in such case must be entered for defendant.
3. Corn. Dig. "Costs," (A 3.) Hulloock, 170.
3. Term Rep. 452.

Woolvil against Young and Another.

Case 180.

THE PLAINTIFF declared upon the *custom of England*, viz. "that if any person sign a bill to pay money at a day, he ought, by the custom, to pay it upon that day;" and then sets forth, that the defendants were *residentes et negotiantes infra hoc regnum Angliæ*, and that they had signed such a bill, but did not pay the money.

And, upon demurrer to the declaration, **IT WAS HELD** to be ill, for this way of declaring so generally will exclude all considerations which must be averred. Every man is *negotians* in the kingdom; and if the plaintiff would have brought his case within the *custom of merchants*, he ought to have said *commercium habentes*, or have shewn that the bill signed was a *bill of exchange*. It is true, in the case of *Sarsfield v. Witherly* (a), the declaration was, that the defendant *Witherly* was *residens et negotians* at London, &c. without saying *commercium habens*; but it appeared upon the whole frame of the declaration that it was a *bill of exchange*.

Co. Lit. 182. Yelv. 136. 4 Co. 76. Cro. Car. 301. Hend. 486. 1. Salk. 124. 130. Comb. 227. Carth. 83. Skin. 264. 1. Ed. Ray. 175. 281. 2. Ld. Ray. 1542. 3. Bac. Abr. 614. 3. Mod. 86. 426. 4. Mod. 242. 1. Show. 130. 317. Kyd on Bills of Exchange, 116.

(a) 2. Vent. 295.

See 9. & 10. Will. 3. c. . and 3. & 4. Ann. c. 9.

* [368]

* Gregory's Case.

Case 181.

GREGORY was committed by commissioners of bankrupts for not answering and making a discovery of his estate; and now he appeared in court upon a *habeas corpus*.

commissioners on affidavit of his having complied. Ante, 274. 308. 2. Stra. 880. Cook B. L. 479.

It

The Court will not discharge a bankrupt committed by the

Michaelmas Term, 9. Will. 3. In B. R.

GREGORY'S
CASE.

It was moved that the writ might be filed, and that he might be discharged upon producing affidavits that he had made a discovery.

But THE COURT would not discharge him; for if the commitment be void, he may bring an action of false imprisonment (a).

In what manner
commissioners
may examine
bankrupt.

1. Atk. 212.
2. Burr. 1124.

The Court said, that the commissioners need not ask the party whether he will be examined or not; for the statute (b) gives them power to examine upon *interrogatories*, which they must prepare, and tender to him ready drawn (c). And this being not returned upon the *habeas corpus* (d), the warrant of commitment for that reason was held void (e).

(a) See 1. Salk. 348. 2. Bl. Rep. 1144.

(b) 1. Jac. 1. c. 15.

(c) But now by 5. Geo. 2. c. 30. f. 16. the commissioners may "examine, as well
" by word of mouth as on *interrogatories* in
" writing, all and every person and per-
" sons against whom any commission of
" bankrupt shall be awarded, touching
" all matters relating to the trade, deal-
" ings, estate, and effects of such bank-
" rupt; and may also examine in manner
" aforesaid every other person duly sum-
" moned before or present at any meet-
" ing of the commissioners touching all
" matters relating to the person, trade,
" dealings, estate, and effects of such
" bankrupt, &c. and shall reduce the

" answers to the verbal examinations into
" writing, &c. &c. which the party ex-
" amined shall sign."

(d) By 5. Geo. 2. c. 30. f. 17. "If
" any person shall be committed for not
" answering any question put by the
" commissioners, the question or ques-
" tions must be specified in the warrant
" of commitment."

(e) By 5. Geo. 2. c. 3. f. 18. on the
return to any *habeas corpus* on such com-
mitment, if the warrant shall appear in-
sufficient, the Court before whom the
party shall be brought, shall commit such
person, unless it appear that he has fully
answered, &c.

Cafe 182.

Ellis against Ellis.

If, to an action
for money lent
and laid out, the
defendant plead
infancy, A RE-
PLICATION
that it was for
necessaries, with-
out saying any
thing as to the
money lent, is
bad.

S.C. Comb. 842.

S.C. 3. Salk. 197.

S.C. 12. Mod. 197.

2083. 3. Bac. Ab. 134. 2.

INDEBITATUS ASSUMPSIT was brought against an executor for sixty pounds, as well for money lent and laid out for the testator, &c. The defendant pleaded that the testator was an infant. The plaintiff replied, PROTESTANDO that William Ellis the testator was not at that time an infant, PRO PLACITO says, that he laid out money for lodging, and for meat and drink for himself and family, and that it was so laid out for necessaries.

And, upon demurrer to this replication, judgment was given for the defendant; for though the plaintiff had made a good answer concerning the money laid out, yet he said nothing to maintain his declaration for the money lent.

S. C. Ld. Ray. 344.

1. Salk. 279. 386.

3. Com. Dig. "Infant" (C. 2.) 2. Stra.

1. Term Rep. 40.

Brewster against Kidgil.

*[369]

Case 183.

THIS was a special action on the case, upon a feigned issue, by consent, to settle a difference between the grantor and the grantee of a rent-charge concerning the payment of taxes.

The plaintiff declared, that he was seised of a rent-charge in fee of forty pounds a-year issuing out of the lands of the defendant, &c. The defendant confessed the seisin, but averred that it was lawful for him to devise four shillings in every pound out of the * said rent for two years and a half, by virtue of an act of parliament, &c. The plaintiff avers, that it was not lawful for him to deduct it; and concluded to the country. The defendant joins issue.

This cause was tried in *Middlesex*, and the jury found a special verdict, viz. that on the twenty-sixth day of *November*, which was in the year 1649, one *Robert Langford* was seised in fee of those lands, and by a deed of the same date, for and in consideration of the sum of eight hundred pounds paid to him by the said *Ellen Brewster*, granted to her and her heirs forty pounds a-year, to be issuing out thereof, payable every half year. There was a covenant for farther assurance, on which deed this MEMORANDUM was indorsed: "MEMORANDUM, That it is the true intent and meaning of these presents within written, that the said *Ellen Brewster* and her heirs shall be paid the said rent-charge of forty pounds a-year for ever after, without any abatement, deduction, or defalcation, for or on account of any taxes upon the lands or the said rent." But it was not proved when this indorsement was made, or by whom. Afterwards the said *Robert Langford*, by another deed made in the year 1652, granted and confirmed this rent-charge to the said *Ellen Brewster* and her heirs, and covenanted therein, that he was seised in fee of the lands out of which the said rent was issuing; that it was free of all incumbrances; that he had good right to grant; and that the said yearly rent, free of all taxes, shall for ever after be paid to *Ellen Brewster* and her heirs.

The question was, Whether the indorsement in the first deed, or the covenant in the second deed, be sufficient to discharge the rent from the taxes now imposed by act of parliament?

The first clause of this act charges four shillings in the pound upon land; but then there is a "PROVISO, that nothing shall make void any agreements between landlord and tenant." In the statute 4. *Will. & Mary*, c. 1. there is no provision made for rent-charges, but in the latter acts those are comprehended. Now a rent-charge can be subject to no other but parliamentary taxes; it is not contributory to church, poor, sewers, or highways. The

A rent-charge in fee was granted in the year 1649, with AN INDORSEMENT on the deed, "that the true intent and meaning of the parties was, that the said rent-charge should be paid clear of any taxes on the LAND or the said RENT;" which clause was confirmed in 1652. By 4 *Will. & Mary*, c. 1. four shillings in the pound is laid upon land, to be deducted by the tenant from the rent, with a PROVISO that it shall not alter the covenants or agreements of the parties. AND IT WAS HELD, that as the land-tax existed prior to the grant of the rent-charge, this covenant on the part of the grantor extended to it, and freed the rent-charge from it, although the particular land-tax was imposed subsequent to the grant.

S. C. 1. Salk. 298.
S. C. 2. Salk. 615.
S. C. 3. Salk. 340.
S. C. Comb. 424.

466. S. C. Carth. 438. S. C. 12. Mod. 160. 171. S. C. Holt, 175. 609. a. 669. 5. Co. 16. Hard. 87.
2. Brownl. 281. 4. Co. 80. Carth. 135. Ld. Ray. 317. 1. Bac. Abr. 540.

words

BREWSTER
against
KIDGIL.

* [370]

words "tax" and "tribute" are synonymous; and, properly speaking, no other charge upon lands is a tax but such as is imposed by parliament; for sums of money which are collected * for the relief of the poor are called *rates* or *assessments*, and have no other denomination; and this was first charged upon land by virtue of the statute 43. *Eliz.* c. 2. for before that time poor people lived upon the charity of religious persons. The word "tax" is also the same with *tallagium*, only the latter is a general word in which the former is included; but both are taken to be when the king has a share of the goods or yearly profits of the lands, and are properly of parliamentary usage. Now though it do not appear when this indorsement was made, yet it is plain that it must have been before the sealing of the other deed. Therefore this word must refer to taxes imposed by parliament, and cannot be restrained to other taxes alone, because then it would be to avoid the intent of the grantor, who used general words to free the rent from taxes. And such construction is rather to be made of this word "tax," because at the time when this deed was made there was an ordinance for a land-tax imposed by the authority then in being; and all words in deeds are to be construed most strongly against the grantor, both with respect to the interest granted and the qualification of the grantor. It is true, that a multitude of words are now confusedly put together by scriveners in all conveyances, as "that the lands shall be free from all taxes, ordinary or extraordinary, imposed or hereafter to be imposed, &c." but such clauses will not guide the judgment of this Court to expound this sentence.

IT WAS INSISTED *on the other side*, that the late acts of parliament do allow the tenants of the land to stop the taxes out of the rent; but there is A PROVISIO which excepts agreements between landlord and tenant: but this case is not within that proviso, neither is any thing found by the verdict which hinders the defendant from deducting the tax out of this rent. The words of the indorsement are not found to be part of the deed, or by whom signed, or when, or that it was the agreement of the parties to the deed upon which the indorsement was made; for the jury find generally, that "*super indentur. sic indorsatur*;" so that must be out of this case. Then it must depend upon that covenant in the deed made in 1652, wherein the grantor covenants that the rent shall be "freed of all taxes, and shall be ever paid, &c."

* [371]

* Now this is not a covenant which is saved in this act of parliament, because such must be a proper agreement relating to parliamentary taxes only. The word "tax" relates to ordinary taxes and imposts, such taxes which are made for relief of the poor, or by authority of commissioners of sewers. It is used in the very commission which is given by the statute of 23. *Hen.* 8. c. 5. It is also named in the statute of *Queen Elizabeth*; and it has been ruled (a), that an inhabitant who has a rent charge, and no other

(a) See Mr. Const's Edition of Bott's Poor Laws, vol. i. ch. 2. sect. 7.

land in the parish, shall be liable to that tax for the poor; therefore there is no reason to construe this word to relate to parliamentary taxes alone: And such as these were the constant taxes when this deed was made. There was nothing like this covenant in the original deed by which this rent was granted, but in the deed for further assurance; and no alteration is found of that first agreement between the parties, but these words were thrown in by a scrivener; therefore it shall not be intended that men do covenant against great and public charges unless particularly named. But if it should be otherwise construed, these words should then extend to no other taxes but such as were in being at the making of this grant, and not to future taxes; for though the word "tax" be a general word, yet an express covenant between the parties "to free the rent from all taxes," shall tie it up to those taxes alone. Agreeable to this is the resolution in *Nokes's Case (a)*, which was, A man "grants and demises" a house for term of years (which words in a grant import a covenant in law), and he expressly covenanted for quiet enjoyment against himself and all claiming under him, and gave bond for performance of covenants; an action of debt was brought upon this bond, and the breach assigned was, that a stranger had recovered in ejectment; and the Court held, that the express covenant, which was much narrower than the covenant in law, restrained that covenant; though it was resolved against the plaintiff in another point, viz. because the plaintiff did not shew that the eviction was not by an elder and sufficient title upon which it was had; for though the stranger recovered by law, yet it may be without a title.

BREWSTER
against
KIDGELL.

Cro. Car. 176.
2. Brownl. 213.
Co. Lit. 139. b.

* CURIA. The question is, Whether this covenant *ex vi termini* is to extend to any imposition to be made by a law subsequent to that covenant? It should have been, "all taxes imposed, or hereafter to be imposed by act of parliament." It cannot be denied, but that this covenant obliges *Langford* and his heirs to pay the rent clear of all taxes; and if so, it extends to such taxes which shall be given by act of parliament.

* [372]
Carrh. 438.
Comb. 211. 424.
466.
Dyer, 52.
Plowd. 1.
38. Hen. 6. pl. 10.

FIRST, Because where *taxes* are mentioned (if the subject matter will allow it) it must be intended taxes by parliament, which are the most eminent. This is agreeable to the opinion of those in former times, who were conversant in the affairs of THE EXCHEQUER, that a *tax* was nothing else but a *subsidy* granted by parliament. There were other ways of taxation then in being, as a *fifteenth* part of the lands or goods of the laity. This was called a *quinzime*, and granted by parliament, and was at first set upon the polls, but afterwards was imposed upon every town in *England*, and then the inhabitants of the respective towns taxed themselves (*b*). The clergy paid yearly *the tenths* of all their spiritual livings, and these were called *dismes*; but when the

(a) *Nokes v. James*, Cro. Eliz. 674.
B. C. 4. Co. 80.

(b) See Year-Book 34. Hen. 8.
abridged by Brooke, title "*Quinzime*," pl. 9.
laity

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* [373]

laity paid both *tenths* and *fifteenths*, that must be understood of personal estates, and not arising out of their lands, *viz.* the tenth part of their goods in cities and borough-towns, and the fifteenth part in the county at large; and this was the ancient way of taxing the people. Now whilst those taxes were in being, such a covenant as this would have no respect to a rent-charge, because the land was always charged, and every occupier knew what to pay, and the rent was never charged. Afterwards there were *subsidies*, and those were always granted by parliament upon urgent occasions, and were usually set upon the person in respect of his lands or goods, *viz.* for lands at four shillings in the pound, for goods at two shillings and eight-pence: This way of taxing began about the thirty-second year of *Henry the Eighth*; and in those days, if the tax upon *the land* amounted to more than that laid upon *goods*, then the land usually paid the tax, and men were then taxed where they lived, and not where they had land. * And even in such case there had been no occasion for such a covenant, for the grantee of a rent-charge was never liable to pay such taxes, which were still imposed by reason of the land. This way of taxing continued till the latter end of the reign of King *Charles the First*; then came *assessments*, or *royal aids*, which were almost the same thing; and last of all, *pound-rates*. The design of the parties in 1649, was to establish a rent for ever free from all taxes; it was in that very year in which taxes of this nature did obtain. If this covenant had been made in the year 1640, it would not have extended to this case, because there were no taxes then in being which charged the land or personal estate; but in 1649, *the rent* was as much taxed as *the land*. The first ordinance of assessment was in *February* 1642; there was another in *February* 1644, and another in *April* 1649; and by this last ordinance, *rents* were taxed, and it was in force when this covenant was made. Now though these were not real acts of parliament, but made in the times of usurpation, yet they had the same efficacy; they had power, but not a legal power, to which the people did generally submit.

ANOTHER REASON why this rent should be taxed, is, because the grant thereof is in fee, and it would fall short of that estate if the covenant should not extend to future acts of parliament. The exposition of statutes is the subject matter of this Court; and it cannot be denied that subsequent acts of parliament have been expounded to relate to things done long before the making such acts: As where there was tenant in tail, and for want of issue by him, the remainder in tail to one *Basset (a)*, the tenant in tail, before the statute which enabled him to make a lease for twenty-one years, or three lives, entered into a recognizance to him in remainder, that he would not alter or dispose the land, but for his own life; and it was adjudged, that if he made a lease pursuant to the sta-

(a) Dyer, 43. b. pl. 5.

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against
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tute (a), it was a forfeiture of his recognizance, though made before the statute. So is the *Rector of Chedington's Case* (b), to whom *Henry the Fourth*, by letters patents, granted, "that he, and his brethren, and successors, should be for ever discharged of all taxes, when and as often as the same should be granted to him by the commons, or a tenth by the clergy," and afterwards a tenth was given to the king by the clergy; the collectors of this revenue, when they came to give up their * accounts, pray to be discharged of this matter, because they could not levy the tenth upon the rector, by reason of the king's charter of exemption; whereupon process went out against him, and he pleaded these letters-patents, and THE ATTORNEY GENERAL demurred; and it was objected by FORTESCUE, the King's Serjeant, that the grant was void, because the king had not this revenue at the time of the grant made; but the latter opinions were, that the grant was good: So here, though this covenant was made in general words long before these statutes, yet it shall extend to subsequent provisions made by act of parliament. It has been objected, that though it may extend to taxes given to the crown by way of assessment, yet it cannot to those new taxes. But these taxations differ not in substance, but in form; for taxes and assessments are of the same nature, and the same things are taxed by both, viz. rents as well as lands.

19. H. 6. fol. 62.
• [374]

THE COURT did not like this way of trying causes by wagers (c).

And they were of opinion, that the plaintiff had no remedy at law upon this covenant against the now defendant, for he was only a *terre-tenant*, and could not be charged as *assignee*, because the covenant did not run with the land, neither was it annexed to the thing granted; and therefore he ought to bring an action against the grantor or his heirs; for this covenant does not extend to any thing or parcel of the demise, but to taxes which had not existence at that time, and is, for that reason, a personal covenant, by which the heir may be charged in respect of assets descended, and not otherwise. He might have remedy in equity against the assignee, but not at law, for that would be to make this covenant of as high a nature as a *warrantia chartæ*.

The grantee of a rent-charge in fee cannot maintain COVENANT against the assignee of the land.
5 Co. 16.
Spencer's Case, Hard. 87.
Cook v. Earl of Arundel.

(a) 32. Hen. 8. c. 28.

(b) 1. Co. 153.

(c) See Annally's Rep. 237. 3. Term Rep. 697. 2. H. Bl. Rep. 45.

Mandamus to grant Administration.

Case 184.

A MANDAMUS was granted last Term to the judge of the spiritual court, to grant administration to J. S. who, as he suggested, was next of kin to the intestate.

a will, the court of king's bench will not issue a mandamus to compel the granting of administration to the next of kin to the supposed testator on a suggestion that he died intestate.—1. Salk. 250. Carth. 153. 2. Stra. 918. 1192. 1. Wils. 12. 1. Salk. 37. Fitz. 202.

NOR-

MANDAMUS
TO GRANT AD-
MINISTRA-
TION.

* [375]

NORTHEY moved for a *superfedeas* to it, for that the fact was, That J. S. being cited, refused to come in; upon which another of the kindred sued for administration, but was opposed in it by one who pretended there was a will; which matter was now * under controversy before the judge there; and therefore until that was determined, the spiritual judge could not obey the *mandamus*.

SHOWER. You commonly grant a *mandamus* to the judges of the spiritual court, upon suggestion that J. S. died intestate, and that J. S. is next a-kin, and if it be false, they may take issue upon it; and so they may do in this case.

HOLT, *Chief Justice*. Is there no difference between a controversy and no controversy? When there is no controversy, we do so; but here is a controversy, and we will not grant a *mandamus* until it be determined; for suppose the will should prove good, what then will the granting administration signify (a)?

(a) But see *Walker v. Woolaston*, 2. S. C. Fitz. 202. *Willis v. Rich*, 2. Atk. Peer Wms. 576 to 589. S. C. 2. Stra. 917. 285. and *Impey v. Pitt*, 2. Show. 63. *notis*.

Case 185.

Sutton against Moody..

Trespass for breaking a man's close, and there hunting and carrying away his conies, is good; for though conies are *feræ naturæ*, yet, while they are on a man's soil, he has a property in them *ratione loci*.

ACTION was brought for breaking the defendant's close, and hunting his conies, &c.

GOULD, *Serjeant*, moved in arrest of judgment, that no action will lie for hunting conies, which are *feræ naturæ*, and so is *Greenbill's Case* (a). As to deer in a park, and conies in a warren, the owner has a special property in them as long as they are in the warren or the park; but if they be not in a park or warren, he may not say *suas*, unless he add, "that they were domestic:" indeed, had it been *warrenam suam*, it might have been good; but now as it is laid, there can be no property presumed.

S. C. 2. Salk. 556.
S. C. Confl. 458.
S. C. 3. Salk. 290.
S. C. 12. Mod.
144.
S. C. Holt, 608.
S. C. 1. Ld.
Ray. 250.
S. C. Comy.
Rep. 34.

22. Hen. 6. pl. 59. 5. Co. 104. 7. Co. 17. Godb. 123. Cro. Jac. 195. Yelv. 104. Cro. Car. 553. 1. Vent. 122. Hutt. 16. 3. Lev. 227. Carth. 285. Owen, 93. 14. Vinier, 329. 18. Vinier, 72. 2. Bac. Abr. 613. 2. Bl. Com. 419.

(a) Cro. Car. 553.
(b) *Rastal's Ent.* 450.
(c) *The Reg.* 93.
(d) *Thel. Dig.* 196.

(e) *Year Book* 25. Hen. 6. pl. 59. b.
(f) 1. Jones, 440. S. C. Cro. Car. 553.
(g) 1. Vent. 122.

ought

Michaelmas Term, 9. Will. 3. In B. R.

bought not to have called them *pisces suos*, unless they had been in a stew or pond, *Sed non allocatur*; for after verdict it shall be intended they were in a stew-pond, but it had been good upon demurrer; it was good by reason of local property; and then * this being after a verdict, it shall be presumed the plaintiff * [376] proved a property.

SUTTON
against
MOODY.

HOLT, *Chief Justice*. The conies are as much *his* in his own ground as if they were in a warren, and the property is *ratione soli*. The warren does not give a greater property. So in the *Year-Book* of 12. *Hen. 8. pl. 10*. If a man start a hare in his own ground, he has a property in it *ratione loci*. Indeed, if deer escape out of a park into the neighbouring ground, you have no longer a property.

1. Cro. 388.
1. Roll. 405.
Ray. 16.
Yelv. 104.
5. Co. 405.
7. Co. 17.
Cro. Jac. 195.
229.

GOULD, *Serjeant*. As for the case of the hawks (a), there was a property *ratione impotentia*.

ROKEBY, *Justice*. Here is a *verdict*, and it was in his own close, and why should any man come there?

HOLT, *Chief Justice*. If the declaration had been *cuniculos* generally, you say he should recover damages; and why, in that case, if not in respect of the conies? Leave out *suos*, and the jury may give damages. Perhaps these rabbits were for the sustenance of his family; and why should you deprive him of it?

JUDGMENT was given for the plaintiff by THE WHOLE COURT, because he had a property by the possession.

(a) Dyer, 306. pl. 66.

Smallcomb against Buckingham.

Case 186.

TWO writs of *fieri facias* were delivered to the sheriff on the same day; ours was delivered first, which, we say, bound the property. Indeed, at common law, before the statute 29. *Car. 2. c. 3.* of frauds and perjuries, if the writ that had the last *teste* had been delivered first, yet the writ that had the first *teste* must take place, as it is in *Cro. Eliz. 174.* and if the lands are charged by the delivery of the writ, no doubt but the sheriff may sell the goods. Now suppose, after the sale of the goods by *fieri facias*, the king's writ comes, the goods may be seized again for the king; for it can be no conclusion or *estoppel* to the sheriff.

If two writs of *fieri facias* be delivered to the sheriff on the same day, that which is first executed, though last delivered, shall have priority; but the party who delivered the first writ, may have remedy against the sheriff.

Now, for the late statute of frauds and perjuries, the question is, Whether there shall be a fraction in a day? for the statute

3. C. 6. Mod. 292. S. C. Comb. 428. S. C. 1. Salk. 320. S. C. Carth. 419. S. C. 3. Salk. 159.
S. C. Holt, 302. S. C. 12. Mod. 146. S. C. 1. Ld. Ray. 251. S. C. Comy. Rep. 35. 6. Mod.
292. 3. Com. Dig. 308. 2. Bac. Abr. 352. 456. 4. Bac. Abr. 460. 10. Vin. Abr.
"Execution," (A. a.) pl. 18. 11. Vin. Abr. "Execution," (Q. a. 2.) pl. 14. Vin. Ab.
"Time," (A. 3.) pl. 6.

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SMALLCOMB
against
BUCKINGHAM.

* [377]

Vide 1. Co. 76.
174.
Ow. 126.
Cro. Eliz. 726.
792.
2. And. 131.

Comb. 452.

says, "time of delivery," but not the day (a) of the delivery, viz. "that no writ of *feri facias*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners to be executed: and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies, and agents, shall, upon the receipt of any such writ, indorse upon the back thereof of the day of the month, or year, whereon he or they receive the same." * Suppose the sheriff make an indorsement, yet the parties are not concluded; but the marking it is only directory to the sheriff. I agree, there is no division of a day, unless in case of necessity; as in *Co. Lit.* 135. and 6. *Co.* 33. b. where there was priority of an instant. If twenty-four hours must be the whole time, then we are in the wrong; but if only the very time of its delivery, then, with submission, our writ ought to take place, it having been first delivered (b). Goods are liable to execution from the time of the *teste* of the *feri facias*, and this shall be said *emanatio brevis* (c).

SHOWER. If the king's writ of *extent* come out after execution, yet the execution is superseded, and the king's *extent* shall take up the goods; but if the sheriff had sold the goods by *bill of sale*, &c. the property is altered, and shall not be devested by the king's writ (d). So here are two writs indorsed the same day, and the sheriff, having made the *bill of sale* to us, is thereby concluded.

HOLT, *Chief Justice*. This is a case of some concern, and it is fit that the law should be settled, and it is worthy consideration. Indeed, here was an honest sale, you put in the writ and let it lie longer; then comes the other and brings the writ the same day, and calls for a *warrant* presently, and so gets a *bill of sale*, and executes it honestly; and now you would defeat it.

(a) 1. Keb. 930. 1. Lev. 173. 3. Lev. 69. 191. 3. Mod. 236. 4. Term Rep. 209.

(b) 1. Sid. 272. Cro. Eliz. 440. 3. Keb. 379.

(c) Bailey v. Bunning, Ray. 142.

(d) In the case of *Lechmere v. Thorowgood*, in Trinity Term, 4. Jac. 2. LORD HOLT, *Chief Justice*, is made to say, that the property of the goods is vested by the delivery of the *feri facias*, and, therefore, that an *extent* from the crown afterwards comes too late, Comb. 123. In the case of *Cooper v. Chitty*, however, LORD MANSFIELD is made to say, that *Comberbatch* must be mistaken in this part of his report, for that no *inception* of an execution can bar THE CROWN, 1. Burr. 16 But this imputed mistake seems

to be doubted, 4. Term Rep. 412. And in the case of *Uppon v. Sumner*, it is decided, that a judgment recovered by a subject, though not completely executed, shall be preferred to the king's *extent* sued out posterior to the judgment, 2. Bl. Rep. 1294. This determination was recognized as good law in the case of *Rourke v. Dayrell*, where it is determined, that if goods be taken in execution on a *feri facias* against the king's debtor, and, before they are sold, an *extent* come at the king's suit, grounded on a bond debt, tested after the delivery of the *feri facias* to the sheriff, the goods cannot be taken upon the *extent*. 4. Term Rep. 402. See also 2. Com. Dig. 538. (G. 8.) 2. Bac. Abr. 352.

At another day,

SMALLCOMB
against
BUCKINGHAM.

HOLT, *Chief Justice*. Though the *fieri facias* was delivered, yet, says the party to the sheriff, you may let it lie, it requires no *haste*; and therefore desires no *warrant*, nor leaves any fee. Now when a second *fieri facias* comes out the same day, upon which the sheriff presently grants, and makes a *bill of sale* of the goods, the sale shall be good, and shall not be avoided. Though the second *fieri facias* was delivered a fortnight after, yet if it be the first executed, it shall be good; and the party has only his remedy against the sheriff (a).

(a) See the case of Rybot v. Peckham, Mich. 19. Geo. 3. B. R. 1. Term Rep. 731. *notis*; that where a *fieri facias* is delivered to the sheriff, and the officer has levied the debt, and made a *bill of sale*, it shall have priority of a former execution in the office: and Hutchinson v. Johnston, Easter, 27. Geo. 3. that when

two writs of *fieri facias* against the same defendant, are delivered to a sheriff on different days; and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution. 1. Term Rep. 729.

* Winter against Loveday:

Resolutio Curiae.

* [378]
Case 187.

THE case, upon a special verdict, in short, is thus: *George Pawlet* makes a settlement on marriage, in which there is this POWER: "That it shall be lawful for the said *George Pawlet*, "during his life, to make leases of the said lands, for the "term of three lives *in possession*, or for the term of thirty "years, or for any other term or number of years, for one, "two, or three lives *in reversion*, so that it be not of an- "cient *demefne* lands." And the lands which were leased in pursuance of this power, were *copyhold lands*, and made for thirty years, and; for aught that appeared, were in the hands of the tenants at that time; and if so, then they could not be leased out in possession.

EYRE, *Justice*. Upon this case, two questions arise:

FIRST, Whether *George Pawlet* had power to make a lease for thirty years, or any other term, determinable on one, two, or three lives? And it is clear that he had such power. It seems to me, that here are distinct clauses; the words, "or for any other term of years, &c." plainly describe another estate; so that he "minable upon one or two lives, so as such demise be not made of any of the ancient demefne lands "parcel of the said manor," is well executed by the grant of AN ABSOLUTE LEASE for thirty years, to commence after the determination of an existing lease for two lives, PROVIDED it be not of *copyhold lands*; for ancient demefne being a quality inseparable from all copyhold lands, they are restrained by the PROVISIO, as being "ancient demefne lands, parcel of the manor;" but the rents and services are demisable within THE POWER. — S. C. ante, 244. S. C. 2. Salk. 537. S. C. Comb. 371. S. C. Carth. 427. S. C. 12. Mod. 147. S. C. Holt, 414. S. C. 1. Ld. Ray. 267. S. C. 1. Freem. 507. S. C. Comy. Rep. 37. 6. Mod. 20. Raym. 132. Poph. 9. Yelv. 222. Lutw. 269. Moore, 404. Fitz. 156. 1. Salk. 187. Moor 184.

A a 2

should

WINTER
against
LOVEDAY.

should have power to make a lease for thirty years absolute, or to make a lease for any term determinable upon lives. There is a difference; where a man has a power to make a lease indefinitely, there he shall not make a lease upon a lease, &c. but where a power expresses what lease he shall make, as a lease *in possession*, or *in reversion*, there he may make it accordingly, *Yelv.* 222. Upon a general power to make leases, without more saying, the law shall adjudge, that these ought to be *LEASES in possession*; for if, by such power, he may make a lease upon a lease, he might make leases *in infinitum*, and detain those in remainder from the possession for ever; which is contrary to the intent of the parties, and against all reason.

* [379]

SECONDLY, Whether he could make such a lease of these lands which are copyhold; for that *demesne lands* are excepted? So that if the lands in question are parcel of the *demesne lands*, this lease cannot be good. * Now if they were copyhold lands, they must be parcel of the manor, since the freehold is in the lord, and in law they are but tenants at will still, and so is *Lit. sect.* 553. Therefore upon this SECOND POINT, I hold that this lease is not warranted by the power; and that, for this reason, judgment ought to be for the plaintiff.

TURTON, *Justice*. I concur with my brother who spoke last, that the lease, under which the defendant claims, is not warranted by the power.

FIRST, I take it, that *George Pawlet* had a power to make a lease for thirty years absolutely; and it seems to me, that the intention was, that he should have such a power, or else these words would have been altogether insignificant; and the words, "or for any other term," would have been sufficient of themselves; and if it should have been for thirty years, for one, two, or three lives, it would have been too scanty.

Vide ante, 245,
246.
6. Mod. 20.

NOW THE NEXT QUESTION is, Whether these lands, being copyhold lands, could be demised, for that in judgment of law, copyhold lands are parcel of the *demesnes*? So is *1. Inst.* And if copyholds are parcel of the *demesnes*, then they are out of the power.

SECONDLY, The next thing I go upon, is upon the marriage-settlement, and the consideration is a portion of eight thousand pounds, and therefore it shall be taken strictly against *George Pawlet*. Then it cannot be presumed, that it was the intent of the parties, that ancient copyhold tenures should be destroyed; and the wife here was to have such a power, though she had but a jointure. Besides, here were other lands upon which the power might have been exercised. Upon the whole, I am of opinion, that judgment must be for the plaintiff.

ROKEBY,

ROKEBY, *Justice*. I concur, that this lease is not warranted by this power. All powers ought to observe two rules: FIRST, The constitution of these powers ought to be interpreted according to the intent of the parties. * SECONDLY, The powers must be strictly pursued. As for the intention of the parties: FIRST, It seems to me that their intention was not to take away the copyhold tenures, and so to have destroyed the manor; and I conceive that copyhold lands are parcel of *the demesnes* of a manor. SECONDLY, I take it, that whatever number of years the lease was made for, it was to be subject to a determinability of life or lives; for the "*ita quod, &c.*" seems to take care, that the owners of the fee should still have a sustenance for their families. The freehold of the copyhold is still in the lord, and the copyhold itself is only at will. The words, "for any other term or number of years," have no weight with me; for it cannot be intended to be of the same duration, both *in possession* and *in reversion*. The case of *Sheecomb v. Hawkins* (a), was on a special verdict: Tenant in fee of the manor of D. which was then in lease for years, levied a fine thereof to the use of himself for life, and after to the use of his eldest son in tail, reserving power to himself to make leases at any time for twenty-one years; before the lease in being expired, he made another lease to J. S. (under whom the defendant claimed) for twenty-one years, to begin after the determination of the former lease, and died; the first lease expired; the son entered, and made a lease to the plaintiff; and it was adjudged for the plaintiff; for it ought to have been a lease *in possession*, and not an interest to begin *in futuro*, or reversion, after another estate determined, for then he might, by infinite leases, detain those in reversion out of possession for a long time, against all reason. In the case of *Leeper v. Wroth*, cited in *Fitzwilliams's Case* (b), there was a proviso to make leases for twenty-one years; and afterwards he who had the power, on the third of April, made a lease for twenty-one years, to commence at the Feast of St. Michael then next ensuing; and although the power was general, to make leases for twenty-one years, without any restraint to make them in possession, or any number of them, but indefinitely to make leases for twenty-one years, yet it was adjudged, that the said lease was void; for that if, by the said power, he might make a lease *in futuro*, or a lease in reversion, though he might make a lease for twenty-one years in possession, yet after that infinite other leases; &c. * These cases are full to confirm me in my opinion, and I hold judgment to be for the plaintiff.

HOLT, *Chief Justice*, having put the case, *ut supra*. The general question is, Whether this be a good lease by virtue of this power? And I AM OF OPINION, that this is not a good lease.

WINTER
against
LOVEDAY.

Two rules of
power.
Cases in Law
and Equity,
446. 467. 475.

* [380]

8. Mod. 249.
381.

Poph. 9.
Cro. Eliz. 5.
Lat. 269.
Raym. 132.
Construction of
powers to make
leases.

* [381]

(a) Yelv. 222. Cro. Jac. 318. S. C. Powers, 413, 414.
1. Brownl. 148. And see Powel on (b) 6. Co. 33.

WINTER
against
LOVEDAY

THE FIRST QUESTION is, Whether this *term* be within the power? And I HOLD, that it is a term within the power. This depends on the penning of the words of this power. Now, in a large sense, any lease made to commence at a day to come, may be called a lease *in reversion*; but that is not meant in this case, but the lease here is rather to be taken in the common sense, from and after a present interest then in being; and the power extends not only to a lease *for years* in reversion, but also to a lease *for life* in reversion; and if it be for life, it is a concurrent interest. But now I take it, as this power is penned, he may make a lease for thirty years in reversion absolute; for the clauses are distinct, to make "a lease for thirty years, OR else for any other term of "years determinable on one, two, or three lives;" so that this word "or" disjoins what follows, and makes it a distinct addition to the precedent matter. So is *Finch's Case (a)*. But whether this copyhold lease was in being at that time is uncertain; and if a man have power to make a lease *in possession* or *reversion*, he cannot do both.

Now as to THE SECOND QUESTION, Whether this power extends to make leases of the copyholds? I do think that this power extends not to a *copyhold estate*; for I agree with my brother ROKEBY, that it was never intended that this power should extend to *copyhold*; for it was not their design to destroy THE MANOR. This *syllogism* will clear the case: All the *demesnes* of the manor are expressly excepted out of this power. * The copyholders are part of the *demesnes*; and therefore Copyholds are expressly excepted out of this power. That the *copyholds* are parcel of the *demesnes*, is so plain, that there needs no authority to be quoted but *Alton Wood's Case (b)*, and that is express. And it is obvious that every manor must consist of *demesnes* and *services*; and those are sufficient to support the being of a manor; for if the lord of a manor alien his *mansion-house* which he had in possession, yet if the *copyholds* and *services* remain, it is still a good manor. Then there was no occasion that this power should extend to *copyholds*. Indeed, it was objected by SIR B. SHOWER, that if you construe this to extend to *copyholds*, there are no other lands to be demised. One of my brothers has answered, that there were *other lands* within the parish which might have been demised. But that will not do, for the land to be devised must be parcel of the manor. As to this, I answer, that this power was subject matter enough to exert itself upon; for he may make leases in the manor of the rents and services; and though it be said "reserving the ancient rent," and that no rent can be reserved out of the rents and services, yet that signifies nothing; for though the qualification cannot be observed, yet the power may still be executed so far as it may be performed. 2. *Roll. Abr.* 202. If a conveyance be of divers manors and lands to the use of J. S. for life, &c. with power to make leases of all, or

* [382]

3. Bullf. 14.
1. Roll. Rep.
142.
2. Roll. Rep.
180.
Skin. 192.
Carth. 427.

(a) 6. Co. 39.

(b) 1. Co. 46.

any

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any part thereof, for three lives, &c. *ita quod* that such rent, or more, be reserved upon every lease, which was reserved, or paid for it, within two years then next before, and some of the land was not leased before at any rent within the two years, he may, by force of this power, make such lease of this land, reserving what rent he pleases, *Cumberford's Case*. And though the words of the qualification be general, yet the application may be particular. In *Hilary Term*, 27. and 28. Car. 2. in the case of *Walker v. Web*, the lease for tithes was held good, without reserving any rent, and yet the power was to reserve rent. * Now indeed, if this exception had separated the *demesnes* from the *rents nad services*, it would have been hard to have made such a construction. So that upon the whole matter, I hold,—FIRST, That this lease for thirty years absolutely, is a good lease within the power.—SECONDLY, That these lands being part of the *demesnes*, were within the exception.

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against
LOVEDAY.

* [383]

JUDGMENT for the plaintiff,

HILARY TERM,

The Ninth of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

* *Trevillian against Andrew.*

* [384]

Case 188.

EJECTMENT. The jury find a lease for ninety-nine years, if three persons so long live; and that one of the lives was in being. They find another lease made to the lessee for ninety-nine years, if he lived so long; and that he assigned his term to the other, who died intestate; and that this person was living. *Spry*, who had a grant of the reversion, entered before ADMINISTRATION *de bonis non* was granted, and died seised. In what case an entry is tolled.

The question was, Whether that had taken away the entry of the administrator?

CURIA. The term had an existence as soon as administration was granted, and the administrator may have a special action of trespass.

NOTA. It was held, that if a lessee hold over his term, you cannot bring an action of trespass without an actual entry.

Lessee holding over is not a trespasser till

entry.—See 4. Geo. 2. c. 28.

Mathew

Cafe 189.

Mathew against Tompfon.

If a conveyance, in consideration of an intended marriage, be made to the husband for life; remainder to the wife for life; with remainder to the use of all the issues female of their two bodies, and the heirs of the bodies of such issues female; and the husband dies leaving issue a daughter; the remainder in tail to the issues female is not so attached in that daughter as not to be devested for a moiety on the birth of another daughter before the particular estate determines.

- S. C. Ld. Ray, 311.
- Vaugh. 28.
- 2. Jones, 27.
- 13. C. d. 56.
- Yelv. 183.
- Co. Lit. 188.
- 5. Co. 8. a.
- Comb. 467.
- 2. Stra. 1172.
- Fearne, C. R. 462.
- 3. Term Rep. 424.
- 4. Term Rep. 462.

EJECTMENT for the scite of the late PRIORY of *Leoffield*, upon the demise of *THOMAS Earl of Suffex*. Upon not guilty pleaded, there was a trial at bar by a jury of the county of *Bucks*; and the plaintiff's title appeared to be thus;

The lands now in question were formerly the lands of *Sir Arthur Throgmorton*, who had issue four daughters; the eldest and the youngest were out of this case.—*Anne*, the second daughter, married *Sir Peter Temple*, and in consideration of that marriage *Sir Arthur Throgmorton*, in the twelfth year of *James the First*, settled these lands in trust for himself for life; then to *Dame Anne* his wife for life; then to *Sir Peter*, and *Anne* his wife, for their lives, and the life of the survivor; and after their decease, then to trustees to preserve contingent remainders; then to the first son of the body of *Anne* by the said *Sir Peter* begotten, or to be begotten, and the heirs males of the body of such first son: “and for want of such issue, then to the use of all the issue female of the body of the said *Anne* by the said *Sir Peter* begotten, and to the heirs of the bodies of such issue female;” with like remainders to her issue by any other husband; remainders to *Elizabeth* his third daughter, and the heirs of her body. *Sir Peter Temple* died without issue male, but left two daughters; *Anne*, who was the *Lady Baltinglasse*, and *Martba*, who died very young; but were both born before the particular estate determined, otherwise the remainder had vested in the elder.

These sisters were jointenants for life, with several inheritances, and my *Lady Baltinglasse* enjoyed the whole for forty years by survivorship, and died in *August* 1696 without issue: so that the lands must now come to the heirs of the body of *Elizabeth*, who married *THOMAS Lord Dacres*, by whom she had issue *Francis*, who had issue *Thomas* the lessor of the plaintiff. There having been some opinions formerly, that my *Lady Baltinglasse* was tenant in tail, by virtue of this settlement, she suffered a common recovery to bar the remainders.

To maintain this opinion it was now said at THE BAR, that the remainder attached in her, and could not be devested by the subsequent birth of her younger sister; for the words, “to the use of all the issue female of the said *Anne* by *Sir Peter*, and the heirs of their bodies,” are words of limitation, and not of purchase; but if they should be adjudged words of purchase, then the estate-tail is vested in the eldest daughter. It is true, if there had been two issues female living at the time of the making this settlement, it would have made them jointenants for life, with several inheritances; but this being upon a marriage settlement, before any issue born, alters the case. The birth of the youngest daughter cannot make her jointenant with the other, for the possession was coupled with the remainder. If it should be otherwise, then these sisters will take by parcels,

Hilary Term, 9. Will. 3. In B. R.

parcels, which cannot be; for admitting the eldest sister should have children, and live many years, and then die, and afterwards a younger sister be born, of what estate can the eldest sister die seised?

MATHEW
against
TOMPSON.

BUT THE COURT were unanimous of another opinion.

THEN the plaintiff was put to prove his title, but could not produce the original settlement made by Sir Arthur Throgmorton, of which he gave this evidence.

In ejectment on a title under a deed of settlement, if the deed cannot be produced, the plaintiff, on proof of its existence, may give parol evidence of its contents.

He proved, that it came to the hands of the Lady Bakinglass; and she having committed a forfeiture, by suffering a recovery, brought the deed to Mr. Grange, to advise with him in that matter. He proved likewise, that this deed was produced before a master in chancery, in a suit there depending, and a copy of it made, but that my Lady got the copy away. He proved also, that there was a trial at law upon a power of making leases, at which trial that copy was produced, and a special verdict found, in which this settlement was set forth in *hæc verba*; the record of which verdict was now produced in court. That there was likewise another controversy upon a lease made of this land, and a bill in chancery exhibited against my Lady Bakinglass, in which this settlement was set forth, and which my Lady admitted in her answer.

Ante, 211.
1. Salk. 285.
6. Mod. 44. 149.
225. 248.
2. Lev. 108, 109.
1. Mod. 4. 94.
114.
2. Vern. 471. 603.
Eq. C. Abr. 228.
Stra. 401. 526.
2. Bac. Ab. 398.
Gillb. L. E. 4th edit. 39. 95.

And upon this proof, my Lord Suffex had a verdict for a moiety.

* [387]
Case 190.

Sanders against Owen.

WRIT OF ERROR to reverse a judgment in the common pleas, in AN ASSIZE of novel disseisin for the office of clerk of the peace of the county of Kent. Upon non disseisavit pleaded, THE RECOGNITORS find a special verdict,

If a *custos rotularum* appoint a clerk of the peace by writing under his hand and seal during his pleasure; and, on the sessions scrupling to admit him, the *custos* declares in court, "I appoint A. to be clerk of the peace according to the act of parliament," this parol declaration is a good appointment under the 1. Will. & Mary, c. 21. for life; although he neither names the

That HENEAGE Earl of Winchelsea was *custos rotularum* of that county, to whom of right it belongs to constitute the clerk of the peace. * They find the statute 1. Will. & Mary, c. 21. by which the *custos*, or other person to whom of right it belongs, shall from time to time nominate the clerk of the peace; that this office being vacant, the said Earl, by writing under his hand, constituted Philip Owen to be clerk of the peace, to exercise the said office either by himself or deputy; which writing they find in *hæc verba*; that at an adjourned sessions at Canterbury, this writing was read in court, and there the said Earl, without any relation to his former grant, did, *viva voce*, say, "I appointed Philip Owen to be clerk of the peace according to act of parliament;" that the Earl of Winchelsea died, and that the Earl of Rumney was made *custos*, who appointed the plaintiff to be clerk of the peace; and that he was a fit person.

county he was appointed for, nor the particular statute he was appointed under; and being for life, he cannot be superseded by the succeeding *custos*.—S. C. 2. Salk. 467. S. C. 3. Salk. 250. S. C. Carth. 426. S. C. Comb. 317. S. C. 12. Mod. 199. S. C. Lilly Ent. 278. Carth. 426.

There

SANDERS
against
OWEN.

There was a judgment for *Owen* in the common pleas; and a writ of error now brought.

IT WAS INSISTED for the plaintiff in error, that no title was found for the plaintiff; for he brought an *offize* for an office at *Maidstone*, and does not say, that *Maidstone* is in *Kent*, so it is ill in substance, and no *venue*; and the Court cannot judicially take notice that *Maidstone* is in *Kent*.

Then as to his title, the pretences are two: FIRST, By *grant*. —SECONDLY, By *parol declaration*.

AS TO THE FIRST, he had no title by the grant. Then as to the *parol* appointment, there is no such thing found; for the words being spoken at the very time the grant was read in court, must have reference to that; and it is all but one act. It does not mention either what estate the person shall have in the office, or in what county he shall be *clerk of the peace*, or according to what act of parliament; for both the statutes of 37. *Hen. 8. c. 1.* and 3. & 4. *Edw. 6. c. 1.* and 1. *Will. & Mary, c. 21.* are all in being, and do all concern this office. So that there is a very great uncertainty in this nomination. If I grant land to another, without mentioning what estate, it is a tenancy at will. He might nominate a man to be clerk of the peace, "according to an act of parliament," and never intend to give him such an estate as directed by the act. * It was the *Earl of Winchelsea's* intention, that *Philip Owen* should have the place; but it does not appear, that he intended it for him during life. "I do appoint *Philip Owen*," &c. These words amount to no more than an evidence of a nomination; but it is not a nomination itself; like the case in *Noy (a)*, where it was held, that a resignation to a *prebtor* does not make the church void, without the acceptance by the bishop; and the jury found an instrument under the seal of the bishop, upon which there is an indorsement that the resignation was accepted by him; this was held to be no finding of an absolute resignation *in facto*. So in the case of a *nuncupative will*, it is not sufficient that the jury find, that the testator *dixit*; but they must find, that he intended it to be his will, or that he spoke the words *animo testandi*. It does not appear that the *Earl* spoke these words *animo constituendi*; therefore they ought to find so much as may amount to fulfil his intent. No freehold of an office can pass at common law without a deed or writing (b); it might be supplied by livery; but that is not found in this case. This office cannot be distinguished from any other, for it is incorporeal, and therefore must pass by one of those ways. Nay, an use, after it was turned into an estate by the statute of 27. *Hen. 8. c. 10.* could not be granted by *parol*. The statute of 1. *Will. & Mary, c. 21.* makes no alteration as to the constitution, but as to the qualification of the person, and duration of his estate; it directs the *custos* to give the office to the clerk of the peace, *quamdiu se bene*

(a) *Noy*, 147.

(b) *Co. Lit.* 61. 1. *Leon.* 219. 3. *Mod.* 147.

gesserit; it was to make him independent of *the custos*, who had an authority to grant him such an estate. Now when the statute requires a thing to be done, and does not direct in what manner, it must be according to the course of the common law, and by that law no freehold can pass by an act executed in the life-time of the person, without deed in writing. And this appears by cases of the like nature, *viz.* all commitments by justices of the peace must be *in writing*, except upon a sudden affray in their view by a court of sessions. A *parol assignment* of commissioners of bankrupts is not good.

SANDERS
against
OWEN.

* *E contra.* As to THE FIRST OBJECTION, "*Maidstone*" will * [389] refer to "*Kent*" in the margin.

The question is, Whether this is a bare *authority*, or an *interest* claimed under *the custos*? And it was insisted, that it was a bare authority, but the nominee had his interest in the office by act of parliament. And this appears by the nature of the office itself; for *the custos* has but an interest at will in it; and therefore the *clerk of the peace* cannot have a larger interest from *the custos* than he had himself in the office, out of which *the clerk's* place is derived. It is like a power given to a man to make leases; as soon as the lease is made, the lessee is in by virtue of the grant, and not by the person who made the lease. It is true, that things which lie in grant cannot pass without deed, which is an instrument that the law has provided instead of livery. So where a man claims a right to an office, it must be by deed; but this is an authority which may be executed by parol, and then it is otherwise. And though it is only an authority, yet *the custos* may lawfully give such an estate as he has done: as if a man devise that his executors shall sell his estate, this is an authority, and no more; and yet when the estate is sold, the vendee is in by the will. The office of register of the court of admiralty may be granted by parol, according to custom. The statute of 37. Hen. 8. c. 1. says, "give, grant, nominate, and appoint," and does not shew in what manner. So that in this case the nomination is the same thing with writing, for both are only to signify the man.

Adjournatur (a).

(a) The court of king's bench, after several arguments, unanimously agreed, that a *verbal nomination* was sufficient, S. C. Carth. 426.; for whatever is to take effect out of a power, or authority, or by way of appointment, is good without deed, S. C. 2. Salk. 467. But see the judgment of the Court on this point at large, 12. Mod. 200. The court of king's bench, however, reversed the judgment of

the common pleas, because the nomination did not mention *the county* for which he was to be clerk of the peace, nor distinguish which of the statutes he meant, S. C. Carth. 426. S. C. 12. Mod. 199.; but afterwards the judgment of the king's bench was carried to the house of lords, and there reversed, S. C. 12. Mod. 199. S. C. Lilly's Entries, 278.

Cafe 191.

Hawkins's Cafe.

If there be a *special custom* in a parish, that the *adornings* of the inside of THE CHANCEL of the church shall be done at the charge of the owners and occupiers of *ancient houses*, yet they are not bound by such a custom both to *ornament* and to *repair* THE CHANCEL; for the parson is bound to *repair* of common right, and the custom does not release him: nor can the owners and occupiers of *mills or racks* be rated towards such ornaments; for where a temporal inheritance is to be charged by a *particular custom*, the custom must be strictly pursued.

S. C. Holt, 139.
S. C. Carth. 360.
Salk. 165.
Comb. 344.
1. Vent. 367.
1. Mod. 79.
194. 236. 261.
4. Mod. 148.
2. Jones, 122.
Post. 447.
Comb. 132.
1. Bac. Abr.
374. 616.

Hard. 379. 5. Co. 66. Cro. Eliz. 659. 2. Jones, 122. 1. Mod. 79. 194. 236. 261. Raym. 246.
Comb. 143. 344. Carth. 143. Comb. 298. Cases in Law and Equity, 12. 64. 385. 439. 2. Roll.
Abr. 298. Hob. 12. 12. Co. 65. Hetley, 87. 2. Inst. 608. Lutw. 174. 1. Sid. 161. Co.
Lit. 6. 2. Ld. Ray. 1390. 3. Burr. 1689.

THE CHURCHWARDENS of the parish of *St. Edmond's on the Bridge*, in *Exeter*, libelled against *Hawkin*, setting forth an ancient custom within that parish, that the *adorning* the inside of THE CHANCEL has been done and performed by the churchwardens, at the public charge of the owners and occupiers of ancient houses within the parish, by a rate to be made by the said churchwardens, by and with the consent of * the major part of the parishioners, having respect to the annual value of the houses; that THE CHANCEL wanted reparations and ornaments; and that the churchwardens, by the consent of the major part, &c. made a rate, which was confirmed by the bishop, by which *Hawkins* was rated seventeen pounds and one shilling for *mills* and *racks* within the said parish, which was his due proportion according to the yearly value of the houses there; and that he had not paid the same.

The defendant suggested for a *prohibition*, that the parishioners ought not to contribute to the repairs, and the *adorning* the inside of THE CHANCEL, and denied the custom; and that the rate was not made by the major part of the parish.

The first issue was found for the plaintiff, that there is such a custom: and the second issue was found against him, *viz.* that the rate was not made by the major part of the parishioners.

IT WAS MOVED in *arrest of judgment*, and that a *consultation* might be granted, because THE SPIRITUAL COURT having the original jurisdiction of reparations of churches, must likewise have the same jurisdiction of all the incidents thereunto belonging, as rates, &c.; and the verdict cannot stand in the way, for the trial is void, because the matter was not triable at law; and therefore the jurisdiction is still saved. If a plea "*ne unques accouple*" should be tried at the assizes, neither party would be concluded by a verdict upon that issue. If there had been any inequality in the rate, it might have been tried at law; but whether a rate or not, belongs to another jurisdiction (a). And to prove, that where the original matter is of ecclesiastical cognizance all the dependants thereon are so likewise, there was a case cited in this court (b), where the churchwardens libelled against a parishioner for a church-tax, but the sentence was against them; whereupon they appealed to the metropolitan, and, pending that appeal, one of them gave the parishioner a release of all actions and demands; the other still proceeding to reverse the sentence, the parishioner moved for

(a) See 3. Term Rep. 3.

(b) Hilary Term, 7 Jac. 1. *Starkey v. Barton*, Yelv. 172.—See also Raym. 246. March, 73.

a prohibition, suggesting this release; and upon demurrer it was held to be no cause for a prohibition, because the principal matter was merely spiritual; and therefore the temporal court would not determine Whether the release, which was dependant upon it, was a bar or not? * And for this reason, though part of the issue be found against the plaintiff, yet he shall have judgment notwithstanding: as where the defendant avowed for rent (a), supposing that one *Vavisor* was seised in fee of the *locus in quo*, &c. and granted the rent; and, upon *non concessit* pleaded, it was found specially, that another person was seised, and made a lease to this *Vavisor*, who granted the rent. Now it happened that this lease was determined before the distress taken; and therefore, though the issue be found for the avowant, "*quod VAVISOR concessit*," yet the estate being determined out of which the rent was supposed to be granted, the Court gave judgment for the plaintiff, though the issue was found against him.

HAWKINS
CASE.

* [391]

E contra. No man can say that the parishioners ought of common right to repair THE CHANCEL; there must be either a *custom* or *prescription* to charge them.—There are two reasons why the defendant cannot be charged in this case: FIRST, They alledge a *custom* for owners and occupiers of *ancient houses* to be contributory to the ornaments of THE CHANCEL; but they have not brought the defendant to be within that custom, for they do not charge him in respect of *houses*, but for *racks* and *mills*. Now if a *mill* should be construed to be a *house*, yet a *rack* is not.—SECONDLY, The charge "for and towards the ornaments of a church or chancel" is a personal charge, and shall never be imposed upon the lands of the parishioners, but upon the inhabitants themselves: if it had been for the repairs of the church, there the land is liable to be rated; but this rate cannot be good, because it is made for him to pay so much for ornaments in proportion to the yearly value of his *racks* and *mills*.

2. Roll. Rep.
162. 270.
2. Roll. Abr.
291. K.
Ante, 68.
Post. 393. 452.

CURIA. Without a *special custom* the parishioners are not to repair THE CHANCEL. The parson is bound to do it of common right; but where a temporal inheritance is to be charged by a particular custom, the churchwardens must bring the defendant within the custom, otherwise it is not good; for it is the custom which gives the jurisdiction. Now in this case the custom was alledged for owners of *houses* to repair, and they have rated the defendant as owner of a *mill*, which cannot be intended d *house*; for in a *præcipe* * *quod reddat* a *mill* cannot be demanded by the name of *domus*, but it must be *de molendino*.

* [392]

Adjournatur.

(*) *Harrison v. Metcalf*, Cro. Jac. 442.

Anonymous.

Cafe 192.

Anonymous.

On producing the writ, the return, and a certificate that common bail was not filed in eight days, judgment may be signed immediately.

Stra. 737.

Gibb. K. B. 369.

Tidd's Pract.

222.

BY THE STATUTE 5. & 6. Will. & Mary, c. 21. (a), for granting to their Majesties several duties upon parchment, paper, &c. it is enacted, "That sixpence shall be paid for every piece of parchment on which any common bail shall be filed, and on which an appearance shall be made upon such bail; which appearance or common bail the defendant shall cause to be entered or filed in eight days after the return of the process, on pain of five pounds, to be paid to the plaintiff, for which the Court shall immediately give judgment, and the plaintiff take out execution."

The writ and return was brought into court, and a certificate from the proper officer that common bail was not filed within eight days, &c.

Upon which a motion was made, and THE COURT gave judgment *nisi*, &c.

(a) See 9. & 10. Will. 3. c. 25. l. 33. 12. Geo. 1. c. 29. ; and 5. Geo. 2. c. 27.

EASTER

E A S T E R T E R M,

The Tenth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* The King against Stainford.

* [393]

Cafe 193.

THE defendant was indicted, For that he on the nineteenth of *June, &c.* and before, being an inhabitant of a town in *Derbyshire*, was summoned to watch with one *Booth* a constable, and that he obstinately, contemptuously, and maliciously made default.

Exceptions were taken.

FIRST, The indictment states, that he was an inhabitant on the nineteenth of *June*, and before, and does not say that he continued to be so.

SECONDLY, It does not say, that notice was given to him to watch within the parish.

THIRDLY, It states that he did not watch with one *Booth* a constable; but it ought to have said that he did not watch at all; for possibly he might watch that night with another constable.

E contra. This indictment is founded at common law, and not upon the statute of *Winton*.—And as to the second exception, it is said that he was summoned to watch with the constable, but does not say within the parish. Now there may be a place extraparo-

The Court will not quash an indictment for not keeping watch, although it do not state, that the defendant continued an inhabitant, or that he had notice to watch, &c. but will put the party to demur.

Ante, 68.

1. Mod. 73.

1. Sid. 218.

2. Keb. 713.

2. Saund. 423.

Comb. 243.

THE KING
against
STAINFORD.

chial, where the constable is to watch. * As to the other exceptions nothing was said.

CURIA. Demur to the indictment. They would not quash it.

Case 194.

Saville against Roberts.

Trinity Term, 9. Will. 3. Roll 724.

An action on the case will lie for falsely and maliciously procuring the plaintiff to be indicted for a riot.

THE now plaintiff was indicted for a riot, and acquitted; and he brought an action on the case against the defendant, for that such a day, in such a year, he did falsely and maliciously procure the plaintiff to be indicted, &c. and had judgment in the common pleas. And now a writ of error was brought to reverse the same.

S. C. post. 405.
S. C. 1. Salk. 13.
S. C. Carth. 416.
S. C. 3. Salk. 16.
S. C. 1. Ld. Ray.
374.
S. C. 12. Mod.
208.
S. C. Holt, 8.
150. 193.
S. C. 3. Ld. Ray.
396.
1. Roll. Abr.
112.
Moor. 600.
Leon. 107.
9. Co. 57.
Yelv. 15. 116.
Ray. 374.
2. Mod. 306.
6. Mod. 30. 90.
137. 185. 169.
Bridg. 131.
1. Sid. 424. 463.
Nat. Brev. 98.
Hob. 205.
2. Inst. 544.

The question was, Whether an action will lie for causing another maliciously to be indicted of a trespass (a)?

It was insisted, that the judgment was well given, and ought to be affirmed. It must be admitted, if the indictment be not good, the action will fail, because the party is not *legitimo modo acquietatus* (b). But there is no such objection here; for it is not pretended but that the indictment was good both in substance and form. The most material objection is, that a man shall not be sued or vexed for prosecuting the king's writ. It is true, that it is lawful to prosecute such writ; but though the suit is legal, yet if it be for a thing which is false, and known to be so even by the plaintiff himself, an action will lie against him for his unjust vexation and malice: And this was the opinion of my LORD HOBART, in giving judgment in the case of *Freeman v. Waterer* (c): It was an action on the case for a double execution; judgment was given for the plaintiff, though he was not twice charged with the damages; for the goods levied by the first execution remained in the sheriff's hands *pro defectu emptorum*, but he was maliciously vexed the second time. It is the malice that is the foundation of all actions of this nature, which incites men to make use of law for other purposes than those for which it was ordained.

* Actions on the case are frequently brought for suing without any cause of action; and it is never allowed to say, that the plaintiff has a sufficient recompence by costs obtained by such suits; for those are but *expensæ litis*; it is the unjust trouble and vexation which intitles him to the action: It lies for maliciously prosecuting one in the ecclesiastical court, and causing him to be excommunicated; in which cause this very objection was made, that a man shall not be punished for prosecuting the king's writ; and it was also objected, that an action will lie for falsely indicting a man for a trespass; yet the Court were of opinion, that a citation *ex officio* prosecuted with malice, was a sufficient ground for the

Cro. Eliz. 378.
Skin. 131.
Carth. 113.
Stra. 144. 691.
1. Bac. Abr. 61.
62.
Bull. N. P. 14.
1. Hawk. P. C.
c. 72. s. 2.
1. Bl. Rep. 385.
Dougl. 214.

(a) See note (a) to an Anonymous Case, 2. Mod. 306. (b) 2. Inst. 385. (c) Hob. 205.

Easter Term, 16. Will. 3. In B. R.

action. An action on the case, in the nature of a conspiracy, will lie against two for conspiring a false indictment; and by the same reason, an action will lie where one alone causes another to be indicted *falso et malitiose*. And this seems to be the ancient law; for in the reign of *Edward the Third*, a bill of conspiracy was allowed in the court to be brought by him who was indicted of a common trespass and acquitted (a).

2. Cro. 193. Ccx v. Vifral, 1. Roll. Abr. 112. placito 10. 3. Aff. placito 13. placito 7. Fitz. N. B. 116. Litt. sel. 3. Reg. 134. b.

(a) The Court was of opinion that the action was well brought, and the judgment of the Common Pleas was affirmed. S. C. post. 405.

SAVILLE
against
ROBERTS.

1. Vent. 86.
Hocking v.
Matthew,
Cro. Car. 291.
2. Inst. 562.
11. H. 7. 26.

Atkinson against Cornish.

Case 195.

BY THE COURT. If an infant be made *executor*, and THE ORDINARY commit administration to another *durante minore etate*, this administration ceases when the infant attains his age of seventeen: But if such administration be granted *durante minore etate* of one who is not made an executor, it does not cease until the party be of full age.

The case of *Pigot v. Gascoigne* (a) was cited to maintain this opinion; which was, *Anthony Longwill* made *William* his executor, who was under age: the plaintiff took out administration to *Anthony* *durante minore etate* of *William*, and brought an action of debt upon a bond, and averred that *William* was alive, and within the age of one-and-twenty.

Now because it did not appear that this administration was granted whilst he was under the age of seventeen, the plaintiff was nonsuited.

Fitzg. 163. 1. Salk. 37. 1. Vent. 219. Skin. 155. Comy. Rep. 109. 159. 4. Burn E. L. 239. 1. Bac. Abr. 382. 3. Bac. Abr. 121. 1. Ld. Ray. 667. 12. Mod. 500. Harg. Co. Lit. 891 b. note (6).

(a) Cro. Eliz. 602. See the Prince's Case, 5. Co. 39.

Cox against Copping.

* [396]

Case 196.

A DIFFERENCE arising between *Cox* the plaintiff, who was impropriator, and the parishioners, concerning the right of a house, he brought an *ejectment*.

And by his Counsel he moved the Court, that the churchwardens, who had the custody of the parish-books, might produce them, so that he might have a sight thereof, and copies of what concerned his title. And this was compared to the cases of *corporations* and *copyholders*, who upon such motions have frequently obtained rules of this Court for the steward to grant copies, and that the court-rolls might be produced at trials. It was likewise said, that if the plaintiff should exhibit a *bill* against the churchwardens, he would have an account of the parish-books.

If an impropriator bring ejectment to recover a house which the parishioners say belongs to the parish, the Court will not make an order for him to inspect the parish-books.

2. Stra. 1005.
1223.
1. Wils. 240.
1. Bl. Rep. 37. 351. 1. Term Rep. 689.

Easter Term, 10. Will. 3. In B. R.

Cox
against
Copping.

Comb. 417.

BUT THE COURT were of opinion, that this case differed from that of *copyholders*, because all the tenants of the manor have an interest in the court-rolls; but here the impropiator has a distinct interest from the parishioners, for it was not a *parochial right*, but a *title* which is now in question. And therefore it was not reason that the parish-books should be produced, which would be to shew the defendant's evidence. Then as to church-wardens, they are not a corporation without the parson (a).

(a) See *Rex v. Dr. Pinnel*, 1. Wils. 1223. and the *Mayor of Lynn v. Denton*, 1. Term Rep. 689. *The Corporation of Barnstable v. Lathey*, 3. Term Rep. 303.
239. *Hodges v. Atkins*, 3. Wils. 398.
Rex v. Hostmen of Newcastle, 2. Stra.

Case 197.

Inhabitants of Battersea against Westham.

The sessions may confirm an order of removal, though it has been previously quashed, during the same sessions.

Ante, 208, 209.

Post. 416.

2. Salk. 472. 494.

606.

Comb. 412.

TWO JUSTICES made an order to remove a poor man from *Westham* to *Battersea*. The parishioners of *Battersea* appealed to the sessions, and the order of the two justices was set aside: afterwards, but in the same sessions, upon allegation of Counsel, the sessions superseded their first order, and confirmed the order of the two justices.

A motion was made to this Court; and it was alledged, that the record was in the breast of the Court during the whole sessions, and therefore they might lawfully supersede their own order.

To which it was answered, that they having once executed their authority, they cannot set it up again.

THE COURT affirmed the second order of sessions, and quashed the first.

* [397]

Case 198.

Anonymous.

A writ of error reversing a recovery may be reversed if brought by him who is not in the immediate remainder.

Dyer, 90.

2. Roll. Abr.

749. Cro. Jac. 138.

5. Com. Dig. "Fleader," (3. B. 9.)

NOTA. PER CURIAM. A writ of error was brought in this court, to reverse a common recovery, and there was a *scire facias* issued out against all the *terre-tenants*, and they made default. The recovery was reversed; and it appearing afterwards, that the plaintiff in the writ of error had no title, there being a * remainder man before him, the Court reversed their former reversal: *Quod nota*.

2. Salk. 339. 2. Salk. 567, 568. 593. 6. Mod. 274. 319. 2. Burr. 756.

4. Bac. Abr. 413.

Case 199.

The King against Eastbridge.

An order taxing one parish in aid of another parish within the same hundred, made originally at the sessions is bad; for such order must begin with two justices.—S. C. Foley, 41.

Ante, 263, 209.

1. Stra. 56.

AN original order was made at the sessions to this effect, viz.

"It appearing to this Court, that the parish of *Dimchurch*, in the hundred of *Worth*, being over-burdened with poor, and the sessions is bad; for such order must begin with two justices.—S. C. Foley, 41.

Post. 416. 2. Salk. 480. Comb. 241. Skin. 259. Fitzg. 83. 1. Bott P. L. 305.

" that

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" that the parish of *Eastbridge*, within the same hundred of *Worth*,
 " having no poor relievable within their said parish; IT IS OR-
 " DERED, that the said parish of *Eastbridge* be from henceforth
 " annexed to the said parish of *Dimchurch*, and that the occupiers
 " of lands and tenements within the said parish of *Eastbridge* be
 " chargeable and contributory towards the relief of the poor of the
 " said parish of *Dimchurch*, the sum of twenty pounds *per annum*,
 " by monthly payments, so long as the said parish shall be over-
 " burdened, and no poor within the said parish of *Eastbridge*."

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A motion was made to quash this order, because it was in na-
 ture of an act of parliament.

But it was quashed, because it was an *original order* : it should
 have begun with two justices.

See 43. Eliz. c. 2. f. 3.

Anonymous.

Case 200.

TWO justices made an order: " BEING INFORMED that the
 " overseers of the poor had refused to pay one shilling a-week
 " to a poor man; they order, that the said overseers shall continue
 " to pay him the arrears till they find him a house."

An order of re-
 lief to a person
 "until the over-
 "seer find him
 "a house," or
 omitting to state
 that he is
 "poor," or
 "impotent," is
 bad.
 Ante, 325.

It was objected against this order,

FIRST, That the overseers have not power to find a house for
 him; that must be done by the consent of the lord of the manor,
 or by the justices in sessions.

SECONDLY, It did not appear that he was *poor* or *impotent* (a).

And for these reasons it was quashed.

2. Salk. 473.
 491.

(a) See *Rex v. Highworth*, *Rex v. Stoke Urley*, and *Rex v. Tipper, Strange*, 10. that these words are indispensably
 necessary in an order of relief.

Atwood against Burr.

Case 201.

THERE was a judgment in *scire facias* against the bail: they
 brought a *writ of error*, as well upon the principal judg-
 ment as upon the judgment in the *scire facias*; but it was quashed,
 because they were not parties to the original judgment.

If bail bring er-
 ror both in the
 judgment in *sci-
 re facias* and in
 the original or-
 der, it is erroneous.—S. C. 1. Salk. 402. S. C. 2. Salk. 369. S. C. Carth. 447. S. C. 7. Mod. 3.
 S. C. 1. Ld. Ray. 553. S. C. Lilly, 225. 250. 403. Cro. Car. 481. 1. Salk. 89. 2. Salk. 603.
 Stiles, 174. 2. Ld. Ray. 821. 1252. 1. Bac. Ab. 217, 218.

der, it is erroneous.—S. C. 1. Salk. 402. S. C. 2. Salk. 369. S. C. Carth. 447. S. C. 7. Mod. 3.
 S. C. 1. Ld. Ray. 553. S. C. Lilly, 225. 250. 403. Cro. Car. 481. 1. Salk. 89. 2. Salk. 603.
 Stiles, 174. 2. Ld. Ray. 821. 1252. 1. Bac. Ab. 217, 218.

* *Savage against Robury.*

* [398]
 Case 202.

THE plaintiff was a tradesman, who brought an action against
 the defendant for scandalous words spoke of him, " You are
 " a cheat, and I will prove you a cheat for many years."

not actionable, unless alledged in something concerning his trade.—S. C. 2. Salk. 694. 1. Vent. 117. 263.
 Ray. 62. 169. Jones, 156. 1. Lev. 280. Latch. 114. 2. Sand. 307. Skin. 364. 1. Lev. 115. 250.
 Stra. 696. 1. Com. Dig. 8vo. 270. 4. Bac. Abr. 492, 493. Ld. Ray. 1417.

To say *passionate-
 ly* to a trades-
 man, " You are
 " a cheat," is

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against
ROBURY.

The plaintiff had a verdict.

But the judgment was arrested, because these were words of *beat*, and not actionable, having not alledged that *the cheat* was in any thing concerning his trade. QUOD NOTA.

Case 203.

Addingson against Oakley.

After judgment, the defendant cannot take any advantage of a mis-entry on the *nisi prius* record.

1. Sid. 203.
Skin. 289.
Carth. 6. 86.
131. 189. 206.
272. 304. 389.
Comb. 149. 234.
426.
Fitzg. 174. 275.
Cases in Law
and Equity, 145.
185. 210. 230.
301.

THE plaintiff had a verdict at THE ASSIZES in Oxford, and a motion was made to stay the judgment till he brought in THE POSTEA, for it did not appear to the Court on what day THE ASSIZES were held; for the record of *nisi prius* was, "*Nisi Justiciar. domini regis ad assisas in com. præd. capiend. assign. &c. die Jovis decimo sexto die Martii apud Oxon'. &c.*" The *assigningas* for the jury to appear, was, "*Si prius die Jovis vicesimo sexto die Martii apud Oxon'. &c.*" So was the *jurata*.

THE COUNSEL for the defendant desired, that it might be referred to the master of the office to be examined.

But THE COURT would not allow it, for it was to examine matter of fact against a record: but they held, that the defendant could not take advantage of this after judgment; for if the clerk of the assise will enter judgment for the plaintiff instead of the defendant, he has no remedy but by action.

* [399]
Case 204.

Carter against Shephard.

If a person go to a banker's, to receive a draft of 100l. and is desired to take 80l. in part, which another is come to pay, and he counts out 50l. from the 80l. and puts it into a bag, and lays it on the counter, this is a good part payment of the draft, and therefore if the bag be stolen from the counter, the banker shall be only answerable for the remaining 50l.

THE defendant was a goldsmith, and the plaintiff had a note of a hundred pounds drawn upon him, which he brought to his shop in order to receive the money. At the same time, another person came thither to pay the goldsmith eighty pounds, which he desired the plaintiff to tell in part of his hundred pounds. Accordingly the plaintiff told fifty pounds thereof, and put it in his own bag, and laid it upon the counter, and whilst he was telling the rest, another person, there being several in the shop paying and receiving money, stole away the bag of fifty pounds. The action was now brought against the goldsmith for the hundred pounds.

* It was said, that this fifty pounds was not paid to the plaintiff, for the whole money must be in the possession of the goldsmith till all was told, for the telling is only in order for payment; and as long as it is subject to be retold by the goldsmith, it is not in the receiver's possession. Now though the fifty pounds was put up in the bag, yet if the eighty pounds had been told short, the goldsmith would have retold the fifty pounds.

CURIA. Telling the money, and resting satisfied when told, is sufficient to carry the possession to the receiver, and he, and not S. C. Salk. 507. S. C. Comb. 475. S. C. 12. Mod. 189. S. C. 1. Ld. Ray. 330. Hob. 154. 6. Mod. 36. 2. Salk. 442. 3. Lev. 299. 3. Mod. 86. Molloy Li. 2. ch. 10. 2. Mod. 23. 3. Lev. 299. Ld. Ray. 928. Com. Rep. 132. 3. Bac. Abr. 562. Gilb. L. E. 115.

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the goldsmith, might have maintained an action of *detinue* for this money in the bag; but the plaintiff had judgment for fifty pounds, and *nil capiat per billiam* as to the rest.

CARTER
against
SHEPARD.

Dubartine against Chancellor.

Case 205.

AN action was brought against the defendant, for lying with the plaintiff's wife: he pleaded in *abatement*; and there being a judgment to *answer over*, issue was joined, and it was tried in the country, and the plaintiff had a verdict.

A plea in abatement must be entered on the NISI PRIUS ROLL.

It was moved to set aside this judgment, because the plea in *abatement* was not entered on the NISI PRIUS ROLL; the PLEA ROLL was right, but the NISI PRIUS ROLL shall not be amended by that.

S. C. Carth. 447.
S. C. 12. Mod 189.
S. C. 1. Ld. Ray. 329.
Ante, 212.

And for this reason THE COURT did set aside the judgment.

1. Salk. 47, 48, 49-53.

3. Bull. 311. Carth. 506. Comb. 393. Dyer, 260. 1. Cro. 275.

The King against the Mayor of Lincoln.

Case 206.

WILLIAM THE THIRD, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. To the mayor and sheriffs, citizens, and commonalty of the city of *Lincoln* in our county of *Lincoln*, greeting: Whereas from time whereof the memory of man is not to the contrary, there hath been had such a custom within the said city, that every person who should serve as an apprentice within the city aforesaid in any art or mystery with any freeman or his assigns, freemen of the city aforesaid, for the space of seven years, might claim the liberty and privilege to be admitted into the place and office of one of the freemen of the city aforesaid, &c. into the freedom of the city aforesaid, and according to the custom of that city to enjoy and use all the liberties, privileges, pre-eminences, and commodities, belonging and appertaining to a freeman of the city aforesaid. And also whereas one *Abraham Morris* hath lately served as an apprentice within the city aforesaid for the space of seven years, in the art or mystery of a mercer, with a freeman of the city aforesaid, and his assigns, freemen of the city aforesaid, according to the custom of the said city, and thereupon hath claimed the liberty and privilege to be admitted by you into the place and office of one of the freemen of the city aforesaid, and into the freedom of the said city to be admitted, and hath offered himself to perform the oath in that case required by a solemn affirmation or declaration according to the act made and set forth in the parliament holden in the 7th and 8th years of the reign of *William the Third* now king of *England, &c.* he the said *Abraham* being then and there one of the dissenters commonly called quakers; nevertheless you the said mayor, &c. well knowing the premises, have not admitted the said *Abraham Morris* into the aforesaid place and office of one of the freemen, and into the freedom of

Mordam to admit a quaker into the freedom of a city, on his affirmation.

S. C. 3. Ld. Ray. 203.

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the city aforesaid, nor have permitted the aforesaid *Abraham Morris* to make a solemn affirmation or declaration according to the said act, instead of the oath in that case used, according to the duty of your office, but so to do you do unjustly refuse, in contempt of us, and to the great damage of him the said *Abraham*, and to the manifest grievance and hurt of his estate, as we have received information by his complaint; We, therefore, willing that due and speedy justice in this behalf be done to the said *Abraham* as is right, command you and every of you, firmly enjoining that immediately after the receipt of this writ, you admit the aforesaid *Abraham Morris* to the place and office of one of the freemen, and to the freedom of the city aforesaid, together with all liberties, privileges, pre-eminences, and commodities thereunto belonging, and permit the said *Abraham Morris* to make the solemn affirmation or declaration aforesaid, instead of the oath in that case used; or signify to us cause to the contrary, lest through your default complaint be again made unto us, &c. Witness, &c.

The Return of the Writ.

The execution of this writ appears in a certain schedule to this writ annexed.

GEORGE BRACEBRIDGE, Mayor.

The Answer of the Mayor, Sheriffs, Citizens, and Commonalty of the City of Lincoln to the Writ to this Schedule annexed, according to the Command of the said Writ.

WE humbly certify to the lord the king, that the city of *Lincoln* aforesaid is not in the county of *Lincoln*, but in the county of the city of *Lincoln*, and that there is had, and from time whereof the memory of man is not to the contrary, there hath been had such a custom within the city aforesaid, that every person who hath served as an apprentice within the city aforesaid in any art or mystery with any freeman or his assigns, freemen of the city aforesaid, for the space of seven years, hath afterwards offered himself in the common council of the mayor, sheriffs, citizens, and commonalty of the city aforesaid, to perform the oath in that case used in these *English* words following: You shall bear faithful allegiance to our sovereign liege lord the king (naming the king then upon the throne), and to his heirs, kings of *England*; and be meet and justifiable to the mayor of this city that now is, and his successors that hereafter shall be, all that may be for the common profit of this city you shall do, and all liberties and franchises thereof you shall maintain: to your power, all ordinances and customs made and to be made, you shall keep. You shall be *levant* and *couchant* to keep house or chamber within this city, and all manner of charges and offices laid to you for commonweal, worship or profit of this city you shall bear, and be contributory to your power. You shall have no part of merchandize with any merchant stranger to sell or colour by any means, but you shall pay toll

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toll for it. You shall colour none of infranchised men's goods, whereby the sheriffalty or the commonalty should lose their right. You shall nothing do nor labour that shall be to the prejudice, derogation, or hindrance of the commonweal or profit of this city, but all points and articles, and what else belongs to be done by a freeman of this city, you shall keep and maintain to your power. So help you God. And not before, hath claimed the liberty and privilege to be admitted into the place and office of one of the freemen of the city aforesaid, and into the freedom of the said city, according to the custom of that city, and to enjoy and use all the liberties, privileges, pre-eminences, and commodities, belonging and appertaining to a freeman of the said city, and after the performing of the said oath, and not before, ought to be admitted by the common council of the mayor, sheriffs, citizens, and commonalty of the city aforesaid, one of the freemen of the city aforesaid, and into the freedom of the city aforesaid, according to the custom of that city, and to enjoy and use all the liberties, privileges, pre-eminences, and commodities, belonging and appertaining to a freeman of the city aforesaid. And we further certify that the said *Abraham Morris* lately, to wit, on the 10th day of *February*, in the eighth year of the reign of the lord the now king, hath served as an apprentice within the city aforesaid for the space of seven years, in the art or mystery of a mercer, with a freeman of the city aforesaid, according to the custom of the said city; and afterwards, on the said 10th day of *February*, in the same eighth year of the reign of the said lord the now king, thereupon at the common council of the mayor, sheriffs, citizens, and commonalty of the said city, then holden within the city, claimed to be admitted then and there by the common council aforesaid to the liberty and privilege into the place and office of one of the freemen of the said city, and to the freedom of the said city, and then and there offered himself, instead of the usual form of oath aforesaid, to make his solemn affirmation or declaration of the words of the oath aforesaid, according to the act made and set forth in the parliament holden in the seventh and eighth years of the reign of the said lord the now king of *England, &c.* intituled, An act that the solemn affirmation and declaration of the people called quakers shall be accepted instead of an oath in the usual form, he the said *Abraham* being then and yet one of the dissenters commonly called quakers; but the said *Abraham* then and there refused to make the oath in the usual form aforesaid, according to the custom of the said city. And we further certify to the said lord the king, that the office and place of a freeman of the city aforesaid, is an office and place of profit in the government in the aforesaid act mentioned; and that within the city aforesaid there is had, and from time whereof the memory of man is not to the contrary, there hath been had such a custom, that every freeman of the city aforesaid should have a voice in the chusing two citizens to serve for the said city in the parliament of this kingdom, whensoever the king should ordain a parliament to be holden, and that

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that every freeman of the said city hath common of pasture in the wastes lying within the city aforesaid, for three horses, or for three cows or three heifers, at all times of the year. And we further certify to the said lord the king, that the said *Abraham Morris* never offered himself in the common council of the mayor, sheriffs, citizens, and commonalty of the city aforesaid to take, nor ever hath taken the said oath in the usual form aforesaid: and for these causes the said mayor, sheriffs, citizens, and commonalty of the city aforesaid, have not admitted the said *Abraham Morris* into the said place and office of one of the freemen, and to the freedom aforesaid, nor have permitted the said *Abraham Morris* to make his solemn affirmation or declaration, according to the act aforesaid, instead of the oath in that case used to be made, but refused so to do the said 10th day of *February*, in the said eighth year of the reign of the said lord the now king.

GEORGE BRACEBRIDGE, Mayor.

Cafe 207.

*[403]

The King against The Mayor of Lincoln.

The statute 7. and 8. Will. 3. c. 34. admits QUAKERS to make affirmation instead of oath, provided it be not to bear any office or place of profit in the government. But the being free-man of a city is not an office under government. Therefore a QUAKER may be admitted to the freedom of a city on his affirmation.

THIS was a *mandamus* to the mayor, &c. of *Lincoln*, to admit one *Abraham Morris* to his freedom, he having served an apprenticeship there.

He was a *quaker*, and the late statute 7. and 8. Will. 3. c. 34. enacts, "That every *quaker*, &c. who shall be required upon any lawful occasion to take an oath, where by law an oath is required, shall, instead of the usual form, be permitted to make his solemn affirmation or * declaration, &c." Then there is a PROVISIO, "That no *quaker* or reputed *quaker* shall, by virtue of that act, be qualified to give evidence in any criminal cause, to serve on any jury, or bear any office or place of profit in the government (a)."

The mayor returned, that the city of *Lincoln* is an ancient city, and alledges a custom, time out of mind, for every person who has served an apprenticeship there, to offer himself to the mayor and common council to take the usual oath (which is set forth in *bac*

S.C. Carth. 448. S. C. 12. Mod. 190. 1. Lev. 91. 1. Sid. 107. 2. Jon. 52. 3. Mod. 333. 1. Sid. 29. 71. 2. Ld. Ray. 1238. 3. Bac. Abr. 535. 556. Vide ante, 316, 317. post. 431, 432.

(a) Continued by 13. and 14. Will. 3. c. 4. and made perpetual by 1. Geo. 1. st. 2. c. 6. But see the 8. Geo. 1. c. 6. for the forms in which *quakers* are to make the declaration of fidelity required by 1. Will. and Mary, c. 18. the solemn affirmation required by 7. and 8. Will. 3. c. 34. and the oath of abjuration required by 1. Geo. 1. st. 2. c. 6. And now by 22. Geo. 2. c. 46. s. 36. in all cases where by

any statute then made, or thereafter to be made, an oath is required, the solemn affirmation or declaration of the people called QUAKERS, in the forms prescribed by the said act of 8. Geo. 1. c. 6. shall be allowed and taken instead of such oath, except "in any criminal cases; or to serve on juries; or to bear any office or place of profit in the government."

verba),

verba), before he shall be admitted to his freedom (a); that the said *Morris* had served an apprenticeship there to a *mercator*; that thereupon he claimed his freedom of the said city, and offered to take the solemn *affirmation* and declaration; that he was a *dissenter* called a *quaker*, and refused to take the usual oath according to the custom of the said city; that to be a *freeman* thereof is a place of profit in the government; that there is a custom there, for every freeman to vote in the election of two citizens to serve in parliament for the said city, and to have pasture for three horses in the common, &c.; that the said *Morris* never offered himself in common-council to take the said oath in the usual form; and that for that reason they did not admit him to his freedom upon his solemn *affirmation* and declaration, &c. which they would not suffer him to take.

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The question was, Whether the freedom of this city was a place of profit in the government?

And IT WAS ARGUED, that it was not; it is only a qualification or a privilege to agree or consent to the person who shall be his representative in parliament.

ON THE OTHER SIDE it was said, that the design of the act is to give ease to the *quakers* who scruple to take an oath, and to relieve them from penalties and punishments for refusing to swear where by law an oath is required. That an oath is not required here, so as to subject a person to a penalty for the refusal, because he who bears an office is not obliged to take an oath but for his own benefit; and he incurs no penalty to refuse it, but only acquits himself of the office. This is either a publick or a private place in the government; it is publick, as it entitles him to vote for representatives in parliament, or private, as to be a magistrate in that particular place where he has obtained a freedom.

CURIA. This person has a precedent right to have his freedom; the *quakers* are usually admitted in *London* upon their solemn affirmation.

And so he was in this case (b),

(a) By 12. Geo. 3. c. 21. "Where any person shall be intitled to be admitted to his freedom, and shall apply to the mayor of the corporation or other person who is authorized to administer, &c. to be admitted a citizen, burgess, or freeman thereof, and shall give notice, specifying the nature of his claim, to such mayor or other person, that if he or they do not so admit such person within one month from the time of such notice, the court of king's bench will be applied to for a *mandamus*; if such mayor, &c. shall, after such notice, re-

fuse or neglect to admit such person, a writ of *mandamus* shall issue to compel such mayor, &c. to admit such person, &c."

(b) See *Rex v. March*, where this case is recognized by LORD MANSFIELD as good law, and where it is determined that a *quaker* may, on his solemn affirmation, be admitted a member of THE TURKEY COMPANY, although by 26. Geo. 2. c. 18. s. 2. it is enacted, that no person, unless he take the oath therein prescribed, shall be admitted to his freedom in the said company. 2. Burr. 1000.

Case 208.

* The King against Blythe.

If the local statutes of a college provide that the person "for whom the master and the major part of the fellows shall vote, shall be elected," the master has only a negative vote; and if one candidate be chosen by eight fellows, and another by the master and six fellows, the Court will grant a mandamus to THE VISITOR to determine the disputed election.

S. C. post. 421.
452.

Post. 452.

Yelv. 65.

Cro. Jac. 60.

Comb. 266.

Skin. 13. 454.

463. 483. 491.

513.

Carth. 93.

4. Mod. 106.

236. 368.

BY the local statutes of CLARE-HALL in the university of Cambridge, it is provided, that the person "*in quem magister et major pars sociorum convenerit pro socio habeatur.*" It happened that Mr. Jennings was chosen by eight of the fellows, and another was chosen by six; and the master of the Hall, Dr. Blythe, gave his vote with the six. Mr. Jennings, supposing himself to be duly elected fellow, brought his *mandamus* (a) to be admitted, having been refused by the master, &c. because it was insisted that his concurrence was necessary; for by the statutes of THE FOUNDER, he must be one, and that without him a fellow could not be elected: the words are, "*in quem magister et major pars sociorum convenerit.*" There was a clause, that if any doubt should arise about the exposition of these statutes, it should be determined by THE VISITOR.

It was argued, that THE VISITOR had only a power to displace upon misdemeanors; that he was appointed to a special purpose, *quoad punitionem*; and that the master had only authority to correct for misdemeanors.

CURIA. It was never yet determined what power THE VISITOR has: in Dr. Patrick's Case (b) the question was, Who was visitor? and the Court was divided. All *eleemosynary corporations* who are to receive the charity of THE FOUNDER, have VISITORS, if they are *ecclesiastical corporations*; and if a particular visitor is not provided by THE FOUNDER, then the ordinary of the place is visitor; if they are *lay-corporations* (c), the founder and his heirs are perpetual visitors.

ROKEBY, Justice, was of opinion, that a fellowship was such an interest for which a *mandamus* ought to be granted; and it would appear upon the return, whether the party had such an interest, or not.

THE COURT were also of opinion, that the master had only a negative vote in this case.

(a) But see 9. Ann. c. 20.

(b) 1. Lev. 65. 1. Sid. 346.

(c) Rex v. Chancellor of Cambridge,

3. Burr. 1647.

Case 209.

* Calverly against Leving.

An action of covenant for non-repair of a house laid in Chester generally, is well tried by a jury from the county of Chester at large.

COVENANT for not repairing a house in Chester. The action was brought in Chester generally: After issue joined, *quod reparavit*, there was a mandate to THE CHIEF JUSTICE of Chester, to award a *venire*, "*quia exitus præd. inter partes præd. superius junct. per ho'ies com. PALATINI CESTRIÆ, videlicet de vicinet. de TARVIN præd. in com. CESTRIÆ præd. ubi breve dom. regis non currit, et alibi triari debet, ideo record. loquela*

S. C. Comb. 472.

S. C. Carth. 448.

S. C. Holt, 710.

2. Roll. Abr. 601.

Ante, 223.

2. Saund. 2. 229. 247.

2. Saund. 252. 258. 393. 414.

Comb. 75.

Carth. 234.

3. Bac. Abr. 257.

" præd.

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præd. mand. justiciar. ipsius domini regis præd. com. CESTRIÆ, ita quod iidem justiciar. dict. domini regis com. CESTRIÆ præd. &c.

CALVERLY
against
LEVINE.

There was a verdict for the plaintiff, and forty shillings damages.

It was moved in arrest of judgment, that this was a *mif-trial*, for the issue was local, *viz.* within *Chester* generally, and the trial was in the county of *Chester* at large; so it was not of a jury of the county or place where the action was laid, but by a jury of the wrong county, which is not aided by the statute, but only a wrong *venue* in a proper county: as if the issue arise at *Islington* in *Middlesex*, and the *venue* is of *Hampstead* in the same county, the county is right; but the *venue* is otherwise. So it was in the case of *Cotton v. Johnson* (a), an ejectment was brought for lands in the county of *Ely*, and the cause was tried in *Cambridgeshire*; it was held good, because *Ely* was part of the county: but in this case there are distinct counties. The statute must not be construed, that the cause shall be tried where the action is laid, but in the county where the issue arises, which was in *Chester*; but this cause was not tried there.

CURIA. Trials have been set aside lately for this reason (b).

- (a) Hilary Term, 1. Will. and Mary. S. C. Carth. 449. for it was tried by a jury of the county where the action was laid, S. C. Comb. 472.: and see now 4. and 5. Ann. c. 16.
(b) The question was moved again, and THE WHOLE COURT held, that it was cured by the statute 16. and 17. Car. 2. c. 3. and gave judgment for the plaintiff,

Roberts against Savill.

Resolutio Curie.

Case 210.

HOLT, Chief Justice. This case comes before us on a writ of error brought upon a judgment given in THE COMMON PLEAS, in an action on the case, wherein the plaintiff declared, that the defendant did falsely and maliciously, &c. cause him to be indicted at the sessions for a riot, upon which he appeared, * and was acquitted; and also, that the defendant did falsely and maliciously cause him to be indicted another time at the sessions for a riot, to which indictment he appeared, pleaded, and was acquitted; by reason of which prosecutions he lost his good name, and was at great trouble and expences, &c. to his damage one hundred pounds. To this declaration the defendant pleads *not guilty*, and issue being joined and tried, the jury gave a verdict for the plaintiff, and eleven pounds damages. The defendant moved in THE COMMON PLEAS for arrest of judgment, and the question there was, Whether the action lay? And upon debate there, the Court was of opinion, that the action did lie: and the same question having been debated and argued here, we are also of the same opinion, that the action does lie. This is no

An action on the case will lie for falsely and maliciously procuring the plaintiff to be indicted for a riot.

* [406]

S. C. ante, 394.
S. C. 1. Salk. 13.
S. C. Carth. 416.
S. C. 3. Salk. 16.
S. C. 1. Ld. Ray.
374.
S. C. 12. Mod.
208.
S. C. Holt, 2.
150. 193.
S. C. 3. Ld. Ray.
196.
2. Mod. 306.
Carth. 416.

6. Mod. 30. 90. 137. 185. 169. Cases in Law and Equity, 145. 210. 217.

new

ROBERTS
against
SAVILL.

Three sorts of
damages which
will support ac-
tions of this na-
ture.

- 1. Salk. 13. 14.
- 1. Vent. 86.
- Ante, 395.
- 1. Sid. 424. 463.
- 3. Edw. 3. pl. 19.
- 3. Affize, 1.
- 7. Hen. 4. pl. 31.
- 11. Hen. 7. pl. 25.
- Stiles, 379.
- Nat. Brev. 98.
- 206.
- 1. Lev. 392.
- Skin. 131.

new point, it has been often controverted here, though I think there are full authorities to maintain this action. And for the better settling the matter, it may be fit to consider, upon what grounds these actions are maintained; and I take it, that there are three sorts of damages which will support all actions of this nature.

FIRST, Where a man is injured in his fame or reputation, so that his good name is lost; by reason of which injury, if the words themselves do not bear an action, the loss or damage that may ensue, will. In the case of *Barns v. Constantine* (a), the action was for indicting the plaintiff before such justices, *ad diversas felonias necnon ad pacem conservand. assignat.* as a common barrator, and that on not guilty pleaded, he was lawfully acquitted; the defendant demanded *oyer* of the indictment; and it was certified to be taken before such Justices *ad pacem conservandam* only; and yet it was held, that the action lies; for that this action being but for damages for the slander, it well lies, although the indictment be *erroneous*; or, as it has been adjudged (b), if a bill be offered, and found *ignoramus*. In the case of *Sir Andrew Henley v. Dr. Bursfall* (c), for maliciously indicting the plaintiff, being a justice of peace, for delivering a vagrant out of custody without examination, the Court said, that where a man prefers an indictment maliciously, and such indictment contains matter of imputation and scandal, as well as crime, there the action will lie. *Sed aliter* where the indictment contains crime without scandal, as on forcible entry; and here is slander as well as crime, and judgment was given for the plaintiff.

* [407]

* THE SECOND relates to a man's person, where he is assaulted or beaten, or put under any confinement whereby he is deprived of his liberty; as appears by the statute 3. Edw. 3. c. 33. But my LORD COKE (d) says truly, that that statute was made in another year, viz. 3. Edw. 3. c. 19.

But neither of these sorts of damages are the foundation of this case, for here his reputation or person are not damaged.

Now there is A THIRD SORT of damages which a man may sustain in respect of his property; and this is the ground of the present action, for that the plaintiff was put to *unnecessary charges* to answer this indictment; and it is most plain, that he was put to unnecessary expences, for that the jury have found this prosecution was false and malicious. Now if there be an injury done to a man's property, occasioned by a wicked and malicious prosecution, it is all the reason in the world that a man should have an action to repair himself. And so it appears in the Year-book of *Edward the Third* (e), which is express. One was indicted by two de-

(a) Yelv. 46. S. C. Cro. Jac. 32.

490. and Wicks v. Fentham, 4 Term

(b) See Chambers v. Robinson, 1. Stra.

Rep. 248.

1891. Jones v. Gwynne, Gilb. Rep.

(c) Ray. 180.

285. S. C. 10. Mod. 148, 214. S. C.

(d) 2. Inst. 566.

1. Salk. 15. Payne v. Porter, Cro. Jac.

(e) 3. Edw. 3 pl. 19.

defendants in another county than where he was demurrant, according to the statute 8. Hen. 6. c. 10. though it be *conspiraverunt*, yet one shall plead without the other, for *the tort* is several; and many other books (a). It has been objected against these old cases, that these actions were grounded upon a *conspiracy*, which is odious in the law, and that to discourage such conspiracies to ruin men, such actions were allowed. But I answer, that in those cases *the conspiracy* was not the ground of the action, but *the damage* (b) which the plaintiff sustained in respect of the needless expences he was put to; for no action lies for the bare *conspiracy*, but it is the *malicious prosecution* which is the ground of the action, and when one only falsely and maliciously carries on the prosecution, yet an action lies; and though it is called an *action of conspiracy*, yet truly it is only an *action on the case* (c). And it is only properly an action of conspiracy where the indictment is for *treason or felony* (d). * And therefore if such an action be brought against two, and one only is found guilty, no judgment can be given, for this is properly a conspiracy, it being to indict a man for so criminal a matter (e). But where the conspiracy is only to indict a man for a *misdemeanor*, though the action be against two, and only one is found guilty, yet judgment shall be against him, as in the case of trespass (f); for really it is an action on the case, and no action of conspiracy.

There has been another objection, and that is, the opinion of the Judges in the case of *Sir Andrew Henley v. Dr. Burnstall* (g), and *Lew v. Beardmore* (h). But though I have a great respect for the authority of the Judges who at that time sat here, yet I think it ought not to have so much weight, for that the Judges only spoke it *obiter*, it not being material to the main point; and when a bill of indictment is not found, there is no damage done. There is a great deal of difference between bringing an action maliciously, and prosecuting an indictment maliciously. In an action a man either claims some title, or complains of an injury; and therefore if a man only think so, the law allows him all just remedy (i). But then if the plaintiff's demands are unjust, he is to be punished by way of amercement, *pro falso clamore suo*; and besides, no man is to prosecute an action without finding of pledges; and where an action was vexatious, the plaintiff was amerced proportionably (k). But indeed, this remedy being but formal, the act of parliament gave the defendant costs: however, the ancient form of finding pledges, and being amerced, is still retained; and though it is true that it is nothing but form, yet the principle of law which makes the difference is still the same (l).

(a) See 3. Affize, pl. 13. 7. Hen. 4. P. C. c. 72. l. 8. 11. Hen. 7. pl. 25, 26. (f) See *Subley v. Mott*, 1. Will. 219. (b) 2. Will. 146. (g) Ray. 180. (c) Fitz. N. B. 110. 116. Jones, 93. (h) Ray. 135. (d) 2. Inst. 562. (i) 4. Co. 16. (e) Finch Law, 189. 252. (f) 3. Bl. Com. 275.

Restate
against
Savill.

* [408]

Action of conspiracy against two, and one is only found guilty.

1. Salk. 13, 14.
- Ante, 223.
1. Saund. 229.
1. Vent. 12. 25.
- Raym. 135. 176.
- 180.
2. Salk. 456.
2. Mod. 306.
6. Mod. 261.
- &c.
1. Hawk. P. C. c. 72. l. 8.
1. Will. 219.

And

ROBERTS
against
SAVILL.

* [409]

Cases in Law
and Equity,
145. 209.

And besides the costs, if it appear that an action is brought merely through malice and vexation, a good action lies upon shewing forth this special matter. So where one man arrests * another for a great sum of money, when but a small one is due; or where a stranger, who is not concerned, brings an action; in either of these cases a good action lies. In the case of *Daw v. Swain* (a), the plaintiff declares, in an action on the case, that the defendant having arrested the plaintiff in *Middlesex*, and intending to detain him in gaol, *falsò et malitiosè* told the sheriff, that the plaintiff owed him five thousand pounds, and that he ought to take bail accordingly, and that he was kept in prison several days, and verdict for the plaintiff; and the plaintiff had judgment, because he had special damage by such parlance. An action on the case in nature of a conspiracy was brought against three (b), one was found guilty, and the other two not guilty; and by the Court, it is good against him that is found guilty; this action was brought to the intent to keep him in prison for default of mancaptors for three hundred pounds, *ubi revera* there was no cause of action (c). The case of *Chamberlain v. Prescott* (d) was for malicious indictment on statute 8. *Eliz.* c. 2. for procuring the defendant to be arrested in another man's name; and held the action lies; yet it is said there, that this judgment was reversed in the exchequer-chamber: and this matter was mightily controverted. And it is true, the judgment in that case was reversed, but it was not because the action would not lie, but because he was not indicted of any offence within the statute, as appeared upon the fact as it was set forth in the indictment: so that if he had been convicted, he could have incurred no damage; for the Court would have arrested judgment. In *Carlion v. Mill* (e) the case was, that the defendant, being apparitor under the bishop of *Exeter*, maliciously, and without colour or cause of suspicion of incontinency, of his own proper malice, procured the plaintiff, *ex officio*, to be cited to the consistory-court, &c. and there to be at great charges and vexation until he was cleared by sentence, which was to his discredit and great expences; it was moved, that the action lay not for this; for he did not cite him but as an informer, and by virtue of his office; but, *PER CURIAM*, the action lay; for it is alledged, that he *falsò et malitiosè* caused him to be cited upon pretence of fame, when no such offence was committed, and avers, that there was not any such fame, so as he did it maliciously and of his own head. In an action on the case against churchwardens (f), for that they *falsò*, &c. to the intent to draw the plaintiff within the ecclesiastical censures for adultery with *A. S.* and the declaration was, that they conspired to do it, and the one was found guilty, and the other not guilty;

(a) Michaelmas Term, 21. *Car.* 2. in *Low v. Beardmore*, Ray. 135.

1. Sid. 424.

(b) 1. Saund. 228.

(c) Gunston's case.

(d) In Michaelmas Term, 1659. cited 112.

(e) Cro. Car. 291. Jones, 312. 1.

Roll. Rep. 63.

(f) Dament v. Rudock, 1. Roll. Abr.

yet this being but an action on the case, it lies. * If *A.* cause *B.* to be indicted for a *common barrator*, upon which indictment *B.* is acquitted, he may have his action against *A.* (*a*).

ROBERTS
against
SAVILL.

Vide 1. Salk. 14.
15.
6. Mod. 137.

But I must tell you, that this action ought to be handled with a great deal of caution, after THE GRAND JURY have found the bill upon their oaths. But indeed, unless *the bill* be found, no action will lie, for that the party is not damaged; neither is it a good ground of action or indictment against a man, that he barely procured him to be falsely indicted; but there must be *express malice* found, that it may appear that the prosecution was not for the sake of justice, but to gratify the party's peevish revenge or malice (*b*).

So that upon the whole WE ALL AGREE, that the judgment must be affirmed.

(*a*)

(*b*) An action for a malicious prosecution will not lie, if *probable cause* appear on the proceedings; and both *malice* and want of *probable cause* are necessary to support this kind of action. *Johnstone v. Sutton*, 1. Term Rep. 428. But the

want of probable cause shall be evidence of malice; and the action will lie, although the bill of indictment be defective, *Wilks v. Tentham*, 4. Term Rep. 247. or the grand jury return it *ignoramus*, *Pollard v. Evans*, 2. Show. 51. *Morgan v. Hughes*, 2. Term Rep. 232.

Memorandum.

Case 211.

IN the vacation after the Term, SIR SAMUEL EYRE, *Knight*, one of the Judges of the court of king's bench, died on the tenth day of *September* 1698, at *Lancaster*, on the northern circuit.

1. Ld. Ray 349.

[410]

Letter to Mr. Wm. J. R. R.

1885
1886
1887
1888
1889

Chas. H.
1889

MICHAELMAS

20

Vol. V.

MICHAELMAS TERM,

The Tenth of William the Third,

I N

The King's Bench,

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General,*

John Hawles, *Esq. Solicitor General.*

* [411]

* *Harrison against Cage and his Wife.*

Case 212.

THIS is an action on the case, wherein the plaintiff declares, that in consideration the plaintiff would marry the defendant, the defendant promised to marry him, and that he had offered himself to her, but that she refused him, and had married the other defendant.

If there be mutual promises of marriage between man and woman, the man may maintain an action on the case against the woman for the breach of her promise.

FIRST, This action does not lie. Indeed it might be otherwise in the case of a woman; for a marriage is an advancement to a woman, but not to a man, as appears in *Anne Davis's Case* (a), and in the case of a feoffment *causa matrimonii prælocuti* (b); which shews, that there is a great difference between the two cases of a man and a woman; for it is a breach of a woman's modesty to promise a man to marry him, but it is not for a man to promise a woman to marry her.

S. C. 1. Salk. 24.
S. C. Carth. 467.
S. C. 12. Mod.
214.
S. C. Holt, 456.
S. C. 1. Ld. Ray.
386.
S. C. Ray. Ent.
403.
1. Roll. Abr.
22. 470.
Cro. Eliz. 79.

SECONDLY, Here is no time laid when this marriage was to be; and it may be still.

THIRDLY, The consideration is ill; it is no more than, "I will be your husband if you will be my wife:" it is no more than this, "I will be your master, and you shall be my servant (c)."

Cart. 273. 1. Sid. 180. 1. Lev. 147. Carth. 99. 1. Keb. 886. 6. Mod. 156. 172. 3. Lev. 65. 2. Salk. 437. 555. 2. Stra. 850. 937. 1. Com. Dig. 8vo. 208. 211. 1. Bac. Abr. 285. 3. Bac. Abr. 574.

(a) 4 Co.

(c) Carter, 240.

(b) See Swinburn's *Espousals*, 74.

C c 2

FOURTHLY,

Michaelmas Term, 10. Will. 3. In B. R.

HARRISON
against
CAGE
AND HIS WIFE.

FOURTHLY, It is not reasonable that a young woman should be caught into a promise.

* [412]

E contra. FIRST, The action very well lies; and certainly marriage is as much advancement to a man as it is to a woman. And I am sorry that the Counsel on the other side has so mean an opinion of a good woman, as to think that she is no advancement * to a man. We say that we have offered ourselves, and that she did refuse us; and though we do not mention the portion, it is well enough.

Nelf. Lutw. 68.
78, 79.
1. Salk. 24.

HOLT, *Chief Justice.* Why should not a woman be bound by her promise as well as a man is bound by his? Either all is a *nudum pactum*, or else the one promise is as good as the other. You agree a woman shall have an action; now what is the consideration of a man's promise? Why, it is the woman's. Then why should not his promise be a good consideration for her promise, as well as her promise is a good consideration for his? There is the same parity of reason in the one case as there is in the other, and the consideration is mutual. As for the case of the *matrimonii præscripti*, that goes upon another reason, there being a scoffment of lands and a condition annexed to it; but this here is upon a contract. In the ecclesiastical court he might have compelled a performance of this promise (a); but here indeed she has disabled herself, for she has married another. Then you might have given in evidence any lawful impediment upon this action; as that the parties were within the Levitical degrees, &c. for this makes the promise void; but it is otherwise of a pre-contract.

TURTON, *Justice.* There is as much reason for the one as for the other; and *Halcomb's Case*, in *Kaughan*, is plain.

ROKEBY, *Justice.* If a man be scandalized by words, *per quod matrimonium amisit*, a good action lies, and why not in this case (b)?

TURTON, *Justice.* This action is grounded on mutual promises.

HOLT, *Chief Justice.* The man is bound in respect of the woman's promise; if she make none, he is not bound by his promise, and then it is a *nudum pactum*; so that her promise must be good to make his signify anything to her; and then if her promise be good, why should not a good action lie upon it?

Judgment for the plaintiff.

(a) But see now the Marriage Act, 26. Geo. 2. c. 33. s. 13.

(b) 1. Roll Rep. 79. 2. Roll. 18. b.

• Odeß against Clark.

Cafe 213.

Trinity Term, 10. Will. 3. Roll 475.

SIR B. SHOWER. This is an action of escape brought against the sheriff, in which the plaintiff declares, that the defendant arrested J. S. by virtue of a *latitat*, but says not out of what court, and afterwards suffered him to escape: and now the sheriff moves in arrest of judgment, and pretends, that the process is not well set forth in the declaration. But the sheriff cannot take advantage of erroneous process. Here is sufficient in the declaration to charge the sheriff, and to shew he has been guilty of a breach of his duty; and if we have alledged sufficient authority for the sheriff to take him, it is well enough.

Quere, If a declaration against a sheriff for an escape, stating, that he arrested the party by virtue of a *latitat*, without stating the court out of which it issued, be good? Antc. 8. 202. Post. 415.

NORTHEY à contra. The exception to the declaration is, that it cannot appear to your lordships, upon this record, out of what court this writ issued. It is only said, that the plaintiff arrested J. S. *virtute ejusdem brevis de latitat* in general, without saying that it issued out of this court; and they have *latitats* in one sense in the common pleas, that is, they have writs in which the word *latitat* is used. Now though a sheriff shall not take advantage of erroneous process, yet he shall take advantage of void writs; and this is a void writ, for that it does not appear out of what court this writ issues; and if a writ issue out of the common pleas, and be made returnable here, it is void.

S. C. 1. Ld. Ray. 397.
1. Salk. 272.
Gilb. Ex. 82.
4. Bac. Abr. 451.
2. Lev. 83.
1. Term Rep. 611.

Upon reading the declaration the words appeared to be, "*quoddam breve de latitat de curiis dom. reg. apud Westmonasterium*," without saying out of which court it issued.

ROKEBY, Justice. A *latitat* goes out of no court but this.

TURTON, Justice. Every one imagines a *latitat* to go out of this court.

COUNSEL. Then it is "*breve de latitat*," and there is no such thing in nature as a "*de latitat*." It should be, "*quoddam breve vocat. latitat*."

* **OBJECT.** Whether *prosecut. fuit in curiâ dom. regis* will not imply this court?

* [414]

RESP. They are all the king's courts; and here it is always said, "*coram ipso rege*."

HOLT, Chief Justice. Suppose he had said only "*latitat*" in general, and had not said "*cur. dom. regis*," would not that be well enough?

Let it stay (a).

(a) It appears, S. C. Ld. Ray. 397. that THE COURT said, that there is no writ properly called a writ of *latitat* but that which issues out of the king's bench;

and therefore seemed to be clear of opinion for the plaintiff. But it was adjourned.

Case 214.

The King against Fells.

An indictment against the keeper of Newgate for an escape, must shew that the prisoner was in his custody as keeper of that prison.

S. C. r. Salk. 272.

S. C. Holt, 279.

S. C. 12. Mod. 226.

S. C. 1. LeLd.

Ray. 424.

Ante, 137.

1. Sid. 208. 439.

An indictment against a gaoler for suffering an escape, must shew that the prisoner was legally committed.

6. Mod. 72.

36. 211.

Ante, 202. 413.

SIR B. SHOWER. We move upon two several indictments of *Fells*, the keeper of *Newgate*, for suffering *Berkenhead* and *Rayes* to escape out of gaol, &c. upon which indictments *Fells* has been found guilty.

And now we move in arrest of judgment :

FIRST, Upon *Berkenhead's* indictment. It is not said, that he was in custody of *Fells* as the keeper of *Newgate*; so that he might be in his keeping tortiously, or out of the gaol, and perhaps he never was within the gaol of *Newgate*, and then the letting him escape is no crime; and to say that *Fells* did negligently permit him to escape out of the gaol, where he was not said to be, will not do. And no indictment shall be taken by *intendment*; the facts must be certainly alledged, that we may know what to answer unto.

SECONDLY, It is not said that *Berkenhead* was in his custody lawfully, or that he was to be there until he were discharged by law. To oblige a gaoler to keep a prisoner, there must be a legal commitment, and there ought to appear a lawful warrant to charge him; and therefore if he did not come there by a lawful warrant, the gaoler is not bound to keep him until he be discharged by law: and perhaps this *Berkenhead* might be only committed until the next sessions, or till examination by a secretary of state, &c.

Comb. 114 295.

An indictment or an escape, stating only that the prisoner was charged with high treason, is bad.—3. Com. Dig. "Escape" (A. 2.). 2. Bac. Abr. 240. 245. 2. Hawk. P. C. ch. 19. f. 2. f. 14.

* [415]

If a gaoler suffer an escape, the action must be against the sheriff.

1. Salk. 272.

Comb. 95. 435.

2. Bac. Abr. 243.

And, **THIRDLY,** It is only said, that he was there charged for high treason, which might be only by fame or hearsay.

* **FOURTHLY,** As to *Rayes's* indictment. It is said, that he was committed in execution to the GAOLER; which is ill, for it ought to be expressed, that he was committed to the custody of the SHERIFF, who is the proper officer: and why should *Fells* be any more subject to be answerable for these escapes than any private turnkey or warder?

4. Bac. Abr. 444.

An indictment for an escape must shew that satisfaction was not made.

FIFTHLY, It ought not to have been, that *Fells* permitted him to escape without satisfaction made to the plaintiff, or performance of the judgment, &c. for it is to the sheriff, who is to see the punishment inflicted or satisfaction made. It is not in the gaoler's power to perform the judgment.

NORTHEY. These indictments are very extraordinary in the frame of them; and certainly, if turned, would not make good declarations. The word "*onerabilis*" is not good; they must shew how he was committed, for that "*onerat.*" is uncertain; and though it is said, he was charged with high treason, yet it is not said, that when

Michaelmas Term, 10. Will. 3. In B. R.

when he escaped, he remained *so charged* as all the precedents are in actions of escape.

ROKEBY, *Justice*. There is certainly a difference between actions of escape and indictments.

TREVOR, *Attorney General*. The gaoler is an officer of whom the law takes notice, and he is answerable for escapes as well as the sheriff.

As to the objection, that it is not said that *Berkenhead* remained charged with high treason at the time of his escape; if the fact were so, then *Fells* might have taken advantage of it at his trial, and he would have been acquitted.—So a general allegation that the judgment was not satisfied, is well enough: if it was satisfied, it ought to have been shewed on their side.—Then the indictment is express, that *Berkenhead* was in *Fell's* custody in *Newgate* as gaoler, and not there in custody of him as a private person. The greatest exception is, that it is only said generally he was charged, and does not shew particularly how; and perhaps in actions of escape the precedents may be so particular, because the party must shew how he is entitled more than any other person, and to ascertain the damage must distinguish the person; but here the king is a sovereign and trustee for the public, and he need not distinguish himself, or shew how he is charged.

* HOLT, *Chief Justice*. FIRST, The charge upon him is as gaoler of *Newgate*, and you do not say *Berkenhead* was in *Newgate*.

SECONDLY, You say, he was charged for high treason; now that might be, and yet he might not be committed for high treason. Suppose he had been in custody for debt or felony, now he may be charged with high treason by another person, and yet all this while he was not committed for high treason. And in indictments for suffering persons to escape, it must appear that the party was lawfully committed (a). There was an indictment (b) for suffering two persons to escape *qui commissi fuerunt* by the justices of peace for offences against the statute of Forcible Entry; error was assigned, because it is not set out how the commitment was, whether upon a view of the justices or verdict on the indictment; and so it appears not whether he was legally committed; and the Court held, that it being but inducement to the offence, and after verdict, shall be intended the commitment was legal.

But, THIRDLY, without doubt gaolers are chargeable for escapes. Indeed, if the gaoler be insufficient, the sheriff is answerable.

Adjournatur (a).

(a) See *Walker's Case*, *Cases Cro. Law*, 92.; *Rex v. Greeniff*, *Cas. Cro. Law*, 292.

(b) *Rex v. Wright*, 1. Vent. 169.

(c) The case was moved again in the Hilary Term following, and the judgment

was arrested on the THIRD EXCEPTION, viz. that it was only said that the prisoner was charged with high treason, and did not shew that he was committed for that crime. S. C. *Ld. Ray*. 424.

THE KING
against
FELLS,

1. Salk. 274.

[416]

Case 215. The Parish of Ricelip against The Parish of Henden.

An order of removal *discharged* on appeal is only conclusive as against the *op- pellent parish*; but an order of removal *affirmed* is conclusive as against *all pa- rishes* with re- spect to settle- ments gained anterior to the order of remo- val.

IT was moved to quash an order of sessions which was made for the removal of a poor fellow from the parish of *Ricelip* to the parish of *Henden*.

They set forth an order of two justices of peace, by which he was removed first of all from *Harrow* to *Henden*. Upon appeal to the sessions he was sent back again to *Harrow*. Then *Harrow* sends him to *Ricelip*, who appeal, and the order is affirmed. Then *Ricelip* sends him to *Henden*, and *Henden* appeals; and that appeal is disallowed. And upon this appeal he was settled at *Ricelip*.

The order by which he was sent from *Ricelip* to *Henden* is not good. The statute of 13. & 14. Car. 2. c. 12. gives an authority to send poor persons to the place of their last legal settlement; and therefore the justices, at their sessions, having once settled this person at *Ricelip*, and so executed their authority, he is not to be removed again.

* [417]

- S. C. 1. Bar.
- K. B. 226.
- S. C. 1. Ld. Ray.
- 394. 425.
- S. C. 2. Salk.
- 524.
- S. C. Sett. &
- Rem. 224.
- S. C. 3. Salk.
- 267.
- S. C. Holt, 572.
- S. C. 2. Bott,
- 122. 674. 807.
- S. C. Fort. 312.
- Ante, 163. 209.
- 396.
- Blackerby's
- Cases, 188, 189.
- 190, &c.
- 2. Salk. 492.
- 4. Com. Dig.
- 8vo. 605.
- 6. Mod. 287.
- 2. Mod. 72.
- 10. Co. 101.

SIR B. SHOWER. I hope this order shall be quashed, for it is at *Henden* that he was legally settled, where he had four pounds a-year freehold: he was never legally settled at *Ricelip*. * We say, that *Ricelip* is not concluded, for that we were never before heard; for an appeal is only final and conclusive between the parties; but shall a combination between two parishes conclude another parish? Because *Henden* has prevailed against *Harrow*, by consent perhaps, that shall not conclude *Ricelip*, which is a third parish, and a stranger to the appeal between *Henden* and *Harrow*.

E contra. If *Ricelip* could have shewn that he had a legal set- tlement elsewhere, it would be something.

SIR B. SHOWER. Our case is this: The parish of *Ricelip* remove him to *Henden*; then *Henden* appeals, and that appeal is disallowed; but it appearing upon the face of the order that he was legally settled at *Henden*, that order ought not to have been likewise quashed.

E contra. The first order was from *Harrow* to *Ricelip*, and that order was adjudged good upon an appeal by *Harrow*; then *Ricelip* sends him to *Henden*, which we say they cannot do, for that they were concluded.

HOLT, Chief Justice. Where the justices of peace give a special reason for their settlement, and the conclusion which they make in point of law will not warrant the premises, there we will rectify their judgment; but if they had given no reason at all, then we would not have travelled into the fact. But here it appears, that he had a freehold at *Henden* which de- scended to him. Now if this man go and live there forty days, shall he be disturbed? No certainly. And though they adjudge this not to be a settlement, yet we determine it otherwise according to law.

But

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But it was said, that the justices have adjudged the matter upon an appeal between *Ricelip* and *Henden*; and that this is conclusive.

THE PARISH
OF RICELIP
against
THE PARISH
OF HENDEN.

TURTON, *Justice*. No, since it appears that this order was good upon the special matter.

SHOWER. This matter comes here upon the whole for the opinion of the Court.

* HOLT, *Chief Justice*. But suppose he had sold his estate at *Henden*, why then his settlement ceased there, and perhaps he might have acquired another elsewhere, and therefore *Ricelip* may well be concluded; for this might be the place of his last legal settlement, and then this parish must maintain him till they find out another parish where he was last legally settled. The question here is, What was the last place at which he was legally settled?

* [418]

TURTON, *Justice*. If it appear that they have adjudged a legal settlement which is not so, we may quash that order, where the special matter appears upon the order.

HOLT, *Chief Justice*. That is true.

ROKEBY, *Justice*. I thought this difference had only been, whether the boarding had been a legal settlement, or his having a freehold, the one being at *Ricelip*, and the other at *Henden*; and if so, I should be of opinion that the settlement is at *Henden*.

TURTON, *Justice*. Here seems to be *res inter alios acta*, &c. for *Ricelip* and *Henden* were not concerned before.

HOLT, *Chief Justice*. But *Ricelip* was no third person, for *Ricelip* was concerned.

TURTON, *Justice*. It plainly appears now, that *Henden* is the place where he was legally settled; and why shall not *Ricelip* send him thither?

HOLT, *Chief Justice*. This fellow shall at this rate be sent up and down from parish to parish, and so made a *vagrant* by the justices of the peace's order. Indeed, the meaning here was, to have the judgment of the Court upon the whole where this man was legally settled, and the design of this order was to lay all matters before us.

SHOWER. We say, that this man was not settled at *Ricelip*, for that he had a freehold at *Henden*.

HOLT, *Chief Justice*. But the adjudication of the justices of the peace was, that he was settled at *Ricelip*, and we cannot falsify their judgment; though it be illegal, we cannot correct them in fact, of which they are sole judges.

* [419]

SHOWER. Two justices of peace cannot send a man over to any other place than his last legal settlement before an appeal,

Michaelmas Term, 10. Will. 3. In B. R.

THE PARISH
OF RICCLIP
against
THE PARISH
OF HERDEN.

2. Salk. 524.
526.

appeal, and why should they have power to send him over after an appeal?

HOLT, *Chief Justice*. Let a man be settled where he will, we are all of opinion, that a man may go and live where he has an *estate*, and therefore that he might have gone to the place where he had a freehold.

Adjournatur (a).

(a) This case was again debated in the Hilary Term following, when HOLT, *Chief Justice*, and GOULD, *Justice*, were of opinion, that Ricclip, by the confirmation of the order removing him from Harrow to Ricclip, was now concluded against all persons and places from contesting that Ricclip was not the place of his last legal settlement, S. C. 2. Salk. 524. TURTON, *Justice*, was of opinion, that it should be conclusive against Harrow, but not against Herden. ROBERT, *Justice*, was of opinion, that the appeal to the sessions was not final in any case, but that it might be removed into the king's bench, and examined there upon its merits, S. C. 1. Ld. Ray 425. And on account of this difference of opinion no judgment was given.

But it seems, that an order of removal affirmed is conclusive on the appellant parish, not only as to the parish removing, but as to all other parishes with respect to settlements anterior to the order of removal, Rex v. Stoney Stratford, 2. Salk. 527.; but not as to settlements subsequently gained, Rex v. Shenfield, 2. Salk. 492.; Rex v. Filingtowe, 2. Bott's P. L. 810. pl. 765. But an order reversed is only conclusive as between the contending parishes, Bedington v. Kingston Bowley, 2. Salk. 486. Carth. 516. Cirencester v. Coln St. Aldwins, Burr. S. C. 17. Rex v. Bradenham, 2. Burr. S. C. 394. Rex v. Bentley, Burr. S. C. 425. Rex v. Leigh, Cald. 59.

Case 216.

The King against Pope.

The sessions cannot commit, but must indict for disobedience to their order.—
Qu. If they can order payment of servants wages.

Ante, 140.

2. Salk. 442.

477. 484.

Carth. 156.

Comb. 63. 213.

325.

MOMPESSEON moved to quash an order made by the justices of peace at their sessions for servants wages and costs of suit.

FIRST, They have committed him to prison for not performing it, which they cannot do; they ought to have indicted him for disobeying their order (a).

SECONDLY, The justices of peace have no power to compel the payment of servants wages (b).

HOLT, *Chief Justice*. Let it be quashed, nisi.

(a) See the case of Shergold v. Holloway, 2. Stra. 1002. 2. Sess. Caf. 100.

(b) The justices of peace have authority concerning the wages of such servants as are hired under the statute 5. Eliz. c. 4. by the year for the service of husbandry, but not otherwise, Rex v. Champion, Carth. 156.; for though by the statute they are only empowered to set the rate of wages, yet they may also order payment of them, Rex v. Gouch, 2. Salk. 441.; and if the order be general, the Court will intend that the servant was employed in husbandry, Rex v. Gregory, 2. Salk. 484.; but if it appear, that the servant is the valet of a gentleman, or the journeyman of a trader, the order is bad, Rex v. London, 2. Salk. 442.; for the justices have only jurisdiction in cases of husbandry, Rex v. Helling, Stra. 8. Atkins' Case, Fort. 318. And

now by the statute 20. Geo. 2. c. 19.

"All complaints, differences, and disputes, between masters and servants in husbandry, hired for a year or longer, or between masters and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time, or in any other manner, may be heard and determined by one justice of the county or place where the master shall inhabit, although no rate or assessment of wages have been made that year by the justices, PROVIDED that the sum in question do not exceed ten pounds with regard to any servant, nor five pounds with regard to any artificer, &c. or other labourer; and if the wages ordered are not paid in one-and-twenty days, the same may be levied by distress."

NORTHEY moved to quaſh an order that was made for the maintaining of a *baſtard-child* when it was born in *lawful wedlock*; becauſe it is only ſaid, that the huſband was at *Cádiz*.

SECONDLY, Then here is a ſum *in groſs* ordered, which is ill. Beſides, we ſay it is a contrivance.

SIR B. SHOWER. None can be a baſtard within the ſtatute 18. *Eliz.* c. 3. ſ. 2. but thoſe who are baſtards within the ſtatute of Stillborn Children, 21. *Jac.* 1. c. 27. and no one will ſay that this woman was within that ſtatute. I grant this child could not inherit the huſband's eſtate, but that goes upon the particular rules of diſcents; but this child is within the ſtatute of 43. *Eliz.* c. 2. and the father ſhould have maintained it.

* I have another fatal exception to this order: It is ſaid, that he was not there when the child was begot or born, in the diſjunctive, which is ill; for he might be there at one of thoſe times, and he might be abſent the whole ſpace of time, both when the child was begot, and when it was born.

HOLT, Chief Juſtice. Suppose a real action had been brought by this child, and baſtardy pleaded, muſt not the biſhop have certified that he was a baſtard? Indeed, where a man is a *mulier*, there muſt be a ſpecial baſtardy certified, for that the biſhops own ſuch a one to be legitimate. But here the father being beyond ſea, Whether this child is not *nullius filius* (a)? And what if he be born within lawful matrimony, yet why is he not within the ſtatute of 18. *Eliz.* c. 3.? Is not the child born in adultery? As to the caſe of ſtill-born children, that ſtatute is a penal law, and to be taken ſtrictly. Is it not an unconſcionable thing for the huſband to keep this child, which was got by another man? Indeed, the other exception requires ſome conſideration. If the child be not a baſtard, the order is *ipſo facto* void; it is out of their juriſdiction; they muſt take care that it be a baſtard.

NORTHEY. But the juſtices have undertaken to ſay, that ſhe was delivered of a male baſtard child; and the reſt ſtands indifferent whether he was here in the mean while; you will not intend it.

SHOWER. It would have been void if you had only ſaid that ſhe was delivered of a baſtard-child.

HOLT, Chief Juſtice. The order muſt be quaſhed; for it muſt appear, that he was not here all the ſpace. If he was here either at the begetting, or at the birth of the child, it is ſufficient.

Let the *reputed father* be bound over to appear here.

(a) See 1. Term Rep. 101. that a baſtard being *nullius filius* applies only in the caſe of inheritances.

An order of two juſtices for the maintenance of the *baſtard child* of a married woman, muſt ſhew that the huſband had *access* for the ſpace of *forty weeks* antecedent to the birth; ſo it is not ſufficient to ſay only, that the huſband was *beyond the ſea*.

* [420]

S. C. Cart. 469.
S. C. Salk. 483.
S. C. Holt, 507.
S. C. Sett. & Rem. 136.
S. C. 1. Ed. Raym. 395.
1. Salk. 122.
2. Salk. 434.
Stra. 51. 925.
1076.
B. R. H. 379.
2. Com. Dig. "Baſtard" (A.).
1. Bott's Poor Laws, 395.
1. Bac. Abr. 311.
Comb. 418.

Cafe 218.

The King *against* Overseers of Shepton Mallett:

A *mandamus* will not lie to overseers to account, unless it appear that there was no other remedy.

AMANDAMUS was granted to the justices of the peace, and to the overseers of *Shepton Mallett*, to give an account for certain monies which they had received, &c. * The justices and overseers make a return, that there was an account given of their monies, and that they had disposed several sums in such particular manner, &c.

2. Salk. 525.

531.

Ante, 314.

6. Mod. 97.

4. Term Rep. 246.

PER CURIAM. Both *the return* and the writ of *mandamus* are very ill (a).

HOLT, Chief Justice. You should have said in your writ, that you could not have your ordinary remedy.

TURTON, Justice. That ought to have appeared as well in the writ itself as upon the suggestion of the Counsel at the bar.

(a) See *Rex v. Mayor of York*, the defendant cannot make any objection 5. Term Rep. 66. where it is said, that to the writ itself, after a return has been made to a *mandamus*.

Cafe 219.

Coot *against* Lynch.

If judgment from *Ireland* be affirmed in *England*, execution cannot issue in *England* for costs of the affirmation, but it may in *Ireland*.

THE QUESTION in this case was, Whether a judgment given here in the king's bench upon a writ of error on a judgment in *Ireland*, could be executed here in *England* for the costs? for that execution had been taken out against the party who was here in *England*.

S. C. 1. Salk.

321.

S. C. Carth.

460.

S. C. Lilly. Ent.

225. 271.

S. C. 12. Mod.

225.

S. C. Holt, 372.

S. C. 1. Ld.

Ray. 427.

Yelv. 118.

Cro. Jac. 535.

Cowp. 843.

2. Bac. Abr.

357.

HOLT, Chief Justice. Whatever judgment the Court gives here must be executed in *Ireland*: here can be no *testatum* go into a foreign county, the original judgment being given in *Ireland*. Would you execute a judgment by piecemeals? Shall you execute an accessory part of a judgment, when the principal judgment cannot be executed here?

ROKEBY, Justice. Execution must follow the nature of the original action, and this Court is to send a *mandate* to the Judges in *Ireland*, to see that the judgment which was given here be put in execution there (a).

HOLT, Chief Justice. I am of opinion, that this execution ought to be set aside.

And so **BY THE COURT**, Let a *superfedeas* go, *quia erroneè*.

(a) See 22. Geo. 3. c. 53. by which *Ireland* is deprived of appealing to the courts in *England*.

The Case of Mr. Jennings of Clare-Hall.

Case 220.

COUNSEL moved, upon a return to a *mandamus* to "The master and fellows of CLARE-HALL" to restore Jennings to his fellowship on Mr. Dickins's foundation.

* They return their several statutes, &c. and that by one of them THE CHANCELLOR is appointed to be their VISITOR, and therefore the master is not obliged to admit Mr. Jennings to his fellowship, there being a VISITOR.

WRIGHT. I take this return to be very insufficient; for I agree, that where there is a *general visitor*, that he ought to be applied to; but here THE CHANCELLOR is only a *visitor* to some particular purposes, as appears by the context of the statute, which says, "If a man be guilty of such particular crimes, why then in omnibus, &c." that is, in all things relating to those facts, he shall be subject to THE CHANCELLOR.

SECONDLY, The king cannot appoint a VISITOR to any particular foundation. Indeed, to hospitals, &c. he may appoint visitors. So that it signifies nothing, though KING JAMES did make a VISITOR; for the Countess of Clare founded this charity in *protectionem rei literatæ*. So that this is wholly a *lay foundation* (a); and it does not appear to be for spiritual matters. So a foundation *ad studend. et orand.* is lay, though it be *ad orand.*; for every man is bound to pray to God.

THIRDLY, The statutes of my Lady Clare, who puts the master and fellows, founded by her, under the power of THE CHANCELLOR, do not subject those fellowships which were founded afterwards to his power. Therefore since we have no other remedy, I hope we shall have a *peremptory mandamus* granted by this court.

E contra. As for what he says out of the return, I shall not answer it.

FIRST, I take it, that no *peremptory mandamus* ought to go, for that he is not duly elected.

SECONDLY, Whether he be or be not duly elected, the examination of it does not belong to this Court, but to another jurisdiction. These fellows are the founder's creatures, and must be subject to the restrictions and limitations that are prescribed by the statutes, which say, "that the majority of the fellows and the master shall chuse;" so that the master's consent is absolutely necessary: and here Dr. Blith is the master, and does not think fit to consent and chuse Mr. Jennings fellow. And here is nothing in the statute to enforce the master's consent. 1. Rol. Abr. 530.

(a) That the corporations of universities are lay foundations, see Rex v. Vice-Chancellor of Cambridge, 3. Burr. 1647.

THE CASE OF * So in *Peterhouse* there cannot be an election without the master's
MR. JENNINGS, consent.

OF
CLARE-HALL. In the next place, here being A VISITOR appointed by the statutes, this Court will not interpose.

THIRDLY, If this cause had related to the old foundation, there had been no doubt of it. Now it is said, that "*in omnibus* THE CHANCELLOR shall be VISITOR."

Then, FOURTHLY, *Profert hic in curia* is not necessary to be in a return.

HOLT, *Chief Justice*. To what purpose should it be produced in court, when nobody is here to demand *oyer*?—As to the merits of the cause: How can they bring in strangers, and make them subject to the restrictions imposed by THE FOUNDER? Though there be A VISITOR for the fellows founded by my *Lady Clare*; yet, Whether the power of this visitor shall be extended to the new fellows? is the question. Whether there must not be a new incorporation of the second fellowship founded by *Dickins*?

ROKEBY, *Justice*. *Dickins's* charity is to be disposed of by the master and fellows, but it does not seem to relate to the old establishment (a).

Adjournatur.

(a) It does not appear that this case was ever decided, 1. Burr. 191. But that new engrafted fellowships, if no statutes be made by the founders of them, must follow the original foundation, and be subject to the same discipline and judicature, see *Green v. Rutherford*, 1. Vezey, 475.; *Attorney General v. Talbot*, 3. Atk. 662.; 1. Vezey, 78.; *Rex v. Bishop of Ely*, 1. Bl. Rep. 76.; and *St. John's College, Cambridge, v. Todding*, 1. Burr. Rep. 158.

Case 221.

Okell against Sudlow.

Power of a rural dean to grant administration.

6. Mod. 134.

145. 241.

1. Salk. 40, 41.

Carth. 148.

THIS is an action of debt upon a bond for forty pounds, wherein the plaintiff declares as administrator to *Thomas Rider*, and sets forth, that administration of all the goods, &c. not exceeding above the sum of forty pounds, was granted to him by *Dr. Cartwright*, dean rural of *Fradsham*, within the diocese of *Chester*, who had a peculiar jurisdiction, &c.

The defendant pleads, that *Thomas Rider* had goods, &c. to above the value of forty pounds, viz. to the sum of fifty pounds, at *Fradsham*, within the diocese of *Chester*; and that the bishop's official had granted the administration of all the goods, &c. of *Thomas Rider* to *Sarah Dutton*, and traverses ABSQUE HOC that *Dr. Cartwright*, the dean rural of *Fradsham*, had any power to grant the aforesaid administration to the plaintiff as he had declared, &c.

* To this plea the plaintiff demurred, and shewed for cause that it is double.

ONELL
against
SUDLOW

HOLT, *Chief Justice*. You shew for cause of demurrer, that the plea is double, and wants form, &c. Now let them shew, that the plea is not double, nor wants form.

ANSWER. Then, with submission, it does not appear that this bond of forty pounds was out of the peculiar's jurisdiction at the time of *Rider's* death. It is said indeed in the plea, that he died at *Fradsham*, but it is not said where this *Fradsham* is, whether within the diocese or not.

HOLT, *Chief Justice*. It does not say, that it was out of the archdeaconry.

ANSWER. It is a dean rural.

HOLT, *Chief Justice*. But you should have shewn some special matter to oust the peculiar.

ANSWER. The peculiar has only jurisdiction of forty pounds, and we have shewed, that the testator had above forty pounds when he died, and traverse that the dean rural had power to grant administration; which is the gift and material part of the declaration.

HOLT, *Chief Justice*. It does not appear he had above that value within the peculiar jurisdiction.

THEN this plea contains double matter.

It is said, that *Thomas Rider*, at the time of his death, had above forty pounds at *Fradsham*; and also, that administration was granted by the bishop's official; so that he has jumbled all together; and therefore the inducement is ill with these several facts jumbled together, when either of them alone might have been a good plea, and a sufficient answer to the declaration.

THEN the traverse is ill, for it is matter of law, Whether the peculiar has a right, or not? which cannot be tried by the jury.

ANSWER. It is a matter of fact, Whether the peculiar has power to grant this administration, or not? which we are willing to have tried, and we have no other way to try it.

* The case of *Price v. Simpson (a)*: *Jackson* lessee for years by several leases of lands, some in the diocese of *York*, and some in another peculiar in the same diocese, devises these lands to his son, and made his daughter, a minor, executrix: the mother administered *durante minoritate*: and *per Curiam*, Administration shall be granted in two places, *viz.* one within the peculiar, and the

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OKELL
against
SEDLAW.

other by the *Archbishop of York*; for the archbishop shall not have any prerogative here, because this peculiar was first derived out of his jurisdiction. There this case is express, that both these jurisdictions are consistent, and that THE PECULIAR and THE BISHOP too may at the same time grant out two administrations; and so it was resolved in that case of *Price v. Simpson*.

Comb. 196.
Cro. Jac. 556.
Palm. 98.

But it is disputed, Whether this peculiar had any jurisdiction at all?

HOLT, *Chief Justice*. Not saying that it was out of the archdeaconry makes the plea immaterial.

Let it stay.

Case 222.

Anonymous.

Both an *action*
and an *informa-*
tion on 5. *Eliz.* c.
4. must be in the
proper county.
Ante, 225.

HOLT, *Chief Justice*. It was resolved lately by TEN OF THE JUDGES, that no action of *debt* lies in WESTMINSTER-HALL for exercising a trade contrary to the statute 5. *Eliz.* c. 4. out of the proper county. But the *prosecutor* is restrained by the statute 21. *Jac.* I. c. 1.

1. Salk. 373. 4. Mod. 145. 158. 164. 6. Mod. 128. 220. Ante, 225. 1. Com. Dig. "Action on
" Statute" (D.). 3. Bac. Abr. 555.—But see the case of *Shipman v. Herbert*, that the 21. *Jac.* I.
c. 4. only restrains the proceedings on penal statutes in the *superior courts* where the informer before the
passing of the act might have sued in the *inferior* as well as the *superior courts*, "by action, bill, plaint,
" suit, or information." 4. Term Rep. 109.

The 21. *Jac.* I.
c. 1. does not
extend to *penal*
statutes made
since that act.

And we were also of opinion, that this statute 21. *Jac.* I. c. 1. only extends to acts made before that act, and not to subsequent acts of parliament. HALE, *Chief Justice*, was always of opinion against the *Case of Hughes*, according to our resolution.

1. Salk. 372. Andr. 25. Carth. 465. 2. Lev. 204. 2. Stra. 1081. 1. Bac. Abr. 40. 3. Bac. Abr. 505. 2. Hawk. P. C. ch. 26. f. 34.

Case 223.

Heyling against Hastings.

A conditional
promise, as
"Prove it and
"I will pay,"
will avoid the
statute of Limi-
tations.

THE PLAINTIFF as executor brings an action of *indebitatus assumpsit* for goods sold by the testator to the defendant. The defendant pleads "*non assumpsit infra sex annos*;" and in evidence it appeared, that the goods were sold six years before the action was brought, &c. but that the defendant said to the * plaintiff, when he demanded the money, "Prove it, and * [426] "I will pay you."

S. C. 1. Salk.
29.
S. C. Carth.
470.

HOLT, *Chief Justice*. We are all of opinion, that this is a new promise, and shall charge the defendant notwithstanding the statute of Limitations. For to say, "Prove it, and I will pay

S. C. 12. Mod. 223. S. C. Holt, 427. S. C. Comy. 54. S. C. 1. Ld. Ray. 389. Gilb. L. E. 178.
2. Ld. Ray. 1101. Bull. N. P. 148. 3. Bac. Abr. 517. Cowp. 548. Douglas, 629. 2. Burr.
1099. 2. Term Rep. 760.

"you,"

"you," is as much as to say, If the goods were sold to the testator, I promise to pay you for them.

HEYLING
against
HASTINGS.

WE ARE ALSO OF OPINION, that if a man *acknowledge* a debt within six years, though this is not a promise, yet it is an evidence of a promise (a). As in the case of trover and conversion, though a denial be not a conversion, yet it is an evidence of a conversion (b).

Acknowledging
a debt is evi-
dence of a pro-
mise to pay.

2. Vent. 152.
Carth. 471.

1. Salk. 29. 1. Com. Dig. 8vo. 220. Gilb. L. E. 258.

(a) The statute of Limitations does not destroy the debt, but only suspends the remedy, 5. Burr. 2630. ; and therefore the slightest word of *acknowledgment* will take it out of the statute, 2. Show. 126. *notis*, though made after the commencement of the action, *Yea v. Fouraker*, 2. Burr. 1099.—See 3. Bac. Abr. 517, 518.

(b) But see 6. Mod. 212. that the very denial of goods to him that has a right to demand them, is an actual conversion, *per Holt*, Chief Justice.—*Vide* 10. Co. 56. 1. Cro. 262. q. 2. Salk. 655. 2. Mod. 245. 3. Mod. 2. 8. Mod. 172.

Mathematics Text, to Will. B. R.

... as much as to say if the goods were sold to the
... to pay for them.

WE are all of us, that it is a man's duty to be
... it is not a promise, yet it is an obligation
... it is the duty of a man to be honest, though
... it is an obligation of a man to be honest.

... to the ...

(1) The first of the ...
... of the ...
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HILARY TERM,

The Tenth of William the Third,

IN

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

Memorandum.

Cafe 224.

GOULD, *King's Serjeant*, was this Term made One of the Judges of the Court of King's Bench, in the place of **SIR SAMUEL EYRE, Knt.** deceased.—And **DARNEL, Serjeant**, was made *King's Serjeant*, in the place of **SIR HENRY GOULD, Knt.**

1. *Ld. Ray.* 414.

* *Parkhouse against Forster.*

* [427]

Cafe 225.

Trinity Term, 9. Will. 3. Roll. 363.

TRESPASS. On a special verdict the jury find, that the plaintiff was a housekeeper at *Tunbridge*, and let out lodgings to strangers, and also furnished them with stable-room for their horses, &c. and that the defendant being **A CONSTABLE**, quartered **A DRAGOON** at the plaintiff's house, for which this action is brought.

A housekeep
at *Tunbridge*
Epsom, or othe
watering-place,
who lets lodg-
ings and fur-
nishes meat and
drink and pro-

vides stable-room, for the company who resort there, for health or pleasure, is not liable, under the mutiny act, to have *soldiers* billeted upon him as upon a person keeping a *public-house*; and therefore if **THE CONSTABLE** quarter a *dragoon* on such *housekeeper*, he is liable to answer in an action of *trespas* for the damages such dragoon may occasion.—*S. C. Salk.* 387. *S. C. Carth.* 417. *S. C. 1. Ld. Ray.* 479. 1. *Show.* 268. 2. *Roll. Abr.* 84. *Kely,* 50. *Palm.* 367. 2. *Roll. Rep.* 345. *Hutton,* 200. 8. *Co.* 32. *Raft.* 405. *Moor,* 877. *Hetley,* 49. *Latch.* 88. *Dyer,* 266. *Cro. Eliz.* 622. 391. 4. *Co.* 123. *Cro. Jac.* 224. 3. *Bac. Abr.* 180.

PARKHOUSE
against
FORSTER.

The question is, Whether the defendant can justify this? and, Whether he has acted in pursuance of the late act of parliament made in the ninth year of his present majesty?

Before the statute 4. & 5. *Will. and Mary*, c. 13. s. 18. (a) the billeting of soldiers was wholly unlawful; but by that act, and also by the 9. *Will. 3. c.* . it is lawful for the constable to quarter soldiers upon *public-houses*; but if the constable billet them upon *private houses*, a good action lies against him, and there is all the caution imaginable used that *private houses* should be exempted from quartering soldiers. *Public-houses* have a different consideration in law from *private houses* of this nature; for a good action will lie against an innkeeper for refusing to entertain a stranger (b). * And an innkeeper has no hire for his lodgings, and is answerable for any goods of his guests which happen to be lost *infra hospitium*: but otherwise it is in case of lodgers in private houses, for the landlord there is not answerable for the loss of their goods; and before the late act of parliament, 3. & 4. *Will. & Mary*, c. 9. it was not felony for a lodger to take away the landlord's goods, though it was with a design to steal them. Then a livery-stable does not alter the case, for that is an entertainment only for horses, and not for guests; and it is found here, that this stable was only for the use of the lodgers; and the stable being part of the house, cannot be taken neither for a livery-stable, which is distinct from a house, as was ruled in the case of *The King v. Marriott* (c). So that we are not within the consideration of an inn, nor within any the four particulars mentioned in the act which seem to describe inns and public-houses (d).

E contra. This action is brought against a poor constable for doing his duty, so that we shall be intitled to all the favour the Court can give us. And I take it, that this case does not depend upon the construction of any act of parliament concerning *tippling-houses*, but merely upon the late act of parliament for billeting soldiers. Now they would exempt this house from quartering soldiers, by saying, that this is not merely an *ale-house* nor a *livery-stable*, but that it is of a mixed nature. Now if it be so to be taken, yet I shall shew it to you to be within the act of parliament. But, say they, this is not an *house of entertainment* generally for all the king's subjects, as *inns* are; but if this evasion should prevail, a great many *ale-houses* would confine their business to a particular sort of people: so the *inns* near the river-side would entertain none but watermen: so an *inn* on the Northern road is not universally used, it is only for people travelling that way; and yet I hope that this is an *inn* to all intents and purposes within the meaning of the act of * parliament; and so at *Epsum*, and those public places, since they entertain any body that comes there, either for the air, pleasure, or health, and they refuse nobody that comes for either

(a) See 7. Geo. 2. c. 2. s. 36.

(b) Godb. 345. Palm. 367. 374.

(c)

(d)

of those purposes, they are as much within the statute as any inns whatsoever. Another reason is, that the intention of the act is to comprehend those that sold *ale* by retail in their houses; and if he had sold *metheglin*, he had certainly been within the express letter of it; and why not in this case? The *membra dividenda* of this act, are the *public-houses* and the *private houses*. If it be not a *private house*, it must be a *public-house*; there are no middle sort of houses.

PARKHOUSE
against
FORSTER.

THEN I observe this upon the declaration, that though the gift of the action is for billeting A DRAGOON upon the plaintiff, yet it is not said that he was quartered there *contra voluntatem* of the plaintiff. Indeed, it is said, that we caused the plaintiff to find THE DRAGOON with meat and drink; but there is no such thing in the verdict, though indeed, there it is said to be against his will, which is not in the declaration; so that what is actionable in the verdict, is not taken notice of in the declaration; and that which is actionable in the declaration, is not found in the verdict. In the verdict it is said, that it was against his will; but not so in the declaration. In the declaration, it is said, that the defendant caused THE DRAGOON to be in the plaintiff's house, where the plaintiff found him meat and drink; but it is not said so in the verdict: so that one or other of them is defective, by reason of which defect the plaintiff cannot recover.

THEN the constable is not responsible for consequential damages. He shall not be answerable for the outrages which THE DRAGOON may commit, who is a free agent; and he is himself responsible for his own injuries which he offers to any person. Indeed, in the case of a beast, the owner is answerable for all damages that may be done by his cattle, the beast not being a free agent: But the statute provides a remedy for damages done by the foldiers themselves.

* HOLT, *Chief Justice*. If a constable place A DRAGOON where it is unlawful for him to do so, he must make satisfaction for the consequential damages; as if THE DRAGOON should, out of a frolick, let the drink about the cellar, or do any other prejudice, the constable is responsible for the damage that ensues; for since the placing of him there was unlawful, it shall be taken as if the constable had put him there on purpose to do an unlawful act.

* [430]
3. Will. 409.

Adjournatur.

Afterwards, in *Trinity Term* following, THE WHOLE COURT were of opinion, that the action was well brought, and that judgment ought to be given for the plaintiff.

[illegible]

I then I observe this of the declaration, that through the gift
 of the action is the following a declaration upon the plaintiff, yet
 it is not said that he was answered there, and a declaration to the
 plaintiff. Indeed, it is said, that we cannot the plaintiff to find the
 declaration with meat and drink; but there is no such thing in the
 writ, though indeed, there it is said to be against his will,
 which is not in the declaration; to the what is actionable in the
 writ, is not taken notice of in the declaration; and that which
 is actionable in the declaration is not found in the writ. In
 the writ it is said, that it was against his will; but not to do
 the declaration. In the declaration it is said, that the defendant could
 not do so, to be in the plaintiff's house, where the plaintiff
 was then present and drink; but it is not said in the writ: it
 was of course of them is decisive, by reason of various defects

There the complaint is not responsible in consequential damages. It shall not be responsible for the damages which the owner may demand, who is a free agent, and he is himself responsible for his own injuries which he suffers in any position. Indeed, in the case of a tenant, the owner is responsible for the damages which may be found by the court, the court may bring a free agent, but the tenant provides a remedy for damages done by the tenant himself.

It is controllable and put them on purpose to do an honest thing the favoring of him there was untoward, it shall be taken as for the mistake is responsible for the damage that arises; it is a fault, but the check against the call or do any other thing for the consequential damages; as if the GRADON should not where it is untoward for him to do so he must make satisfaction. - Henry Clay Johnson. It is controllable place A GRADON

It is urged that the action was well proved and that the plaintiff ought to be given her costs.

E A S T E R T E R M,

The Eleventh of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Henry Gould, *Knt.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

} *Justices.*

* The King against Dr. Burrel.

• [431]

Cafe 226.

THIS is an information against *Dr. Burrel*, for executing the office of CENSOR of the college of physicians, he not having taken the oaths as the statutes do direct.

To this information the defendant pleaded *not guilty*; upon which the jury find a special verdict, which was very long: but,

The single question is, Whether this be such an office, and place of trust, as is within the statute of 25. *Car. 2. c. 2.* and the new statute 1. *Will. & Mary, c. 8.* which require the taking of the oaths?

PRO REGE. I hold this to be an office within those statutes. I will consider the nature of an office. In the *Latin*, the word "*officium*" signifies the place and duty of it, and therefore an office is generally taken for a place of trust: so in statute 3. *Jac. 1. c. 5.* it is said, "that no Popish recusant shall exercise any office or charge." So *Blount*, in his Law Dictionary. So *Finch*, 13. Now I will consider whence this office is derived. The royal authority is the supreme office and charge of our constitution, and of our government; and has likewise under him the

Q. If the censor of the college of physicians be such an officer as is compellable to take the oaths required by the 25. *Car. 2. c. 2.*

S. C. Carth. 478. Ante, 316. 403.

4. Mod. 233.

3. Bac. Abr. 719.

1. Hawk. P. C.

ch. 3.

THE KING
against
DR. BURRELL.

*[432]

care and preservation of all his subjects healths; which office in this particular is exercised by the censors of the * college in subordination under him; and therefore those who have any branch of the regal office, ought to be termed officers under him: so are watchmen, &c. (a). And these CENSORS are not only officers for the college, but they are designed for the public advantage and benefit, to take care of the people's health, by supervising and correcting all offenders against the rules and methods of physick. So Judges, and those who inflict punishment, are officers: and the statute 15. Hen. 8. c. 5. says, "that THE COLLEGE OF PHYSICIANS was incorporated for the good of the commonwealth." But it is objected, that an inferior civil officer, as a constable, watchman, &c. is not within those statutes. But this admits of an easy answer; for these officers are wholly servile and subordinate; but these CENSORS are judges, and may fine and imprison, and make rules and orders, &c. and not altogether subordinate.

E contra. I take it plainly, that this office is not within the statute, which has wholly a reference to the public administration that concerns the public peace, manners, and government of the people; but these CENSORS are not officers appendant to the government, they only depend upon a private constitution which relates to the particular science of physick. It is an office of art and science, and the principal thing is knowledge; it does not intermeddle with the government, or with public affairs. It is no more an office than a schoolmaster's place. Then it was never known, that any of these CENSORS did at any time take these paths; they never looked upon themselves to be within this statute,

HOLT, *Chief Justice.* The only question is, Whether this is a public officer, or not?

ROKERY, *Justice.* I do not think but a Popish doctor may be a good doctor to a Protestant patient; but I do not think that a Popish governor can be a good governor for a Protestant subject.

HOLT, *Chief Justice.* Aye, but a Popish censor is not so proper to supervise and inspect all the Protestant physicians.

Adjournatur.

(a) Year Book 32. Edw. 4. pl. 23. 9. Co. 63.

*[433]

Cafe 227.

The archbishop
has a power over
his suffragans,
and may deprive

them for an offence committed against the spiritual duties of their office; but if THE LIBEL also contain charges of a nature cognizable by the temporal courts, a prohibition shall go as to those charges.—S. C. 1. Salk. 135. 7. Mod. 56. 117. 1. Salk. 196. 294. Carth. 484.

* The Bishop of Chester's Case (a).

THE BISHOP had moved for a prohibition to THE DELEGATES, to whom he had appealed upon a libel against him in THE ECCLESIASTICAL COURT.

(a) *Quære*, If this be not the case of David's. See 1. Salk. 134. Farresley, 56. Dr. Watson, the quondam Bishop of St. 117. NOTE to former edition.

WRIGHT,

Easter Term, 11. Will. 3: In B. R.

WRIGHT, *Serjeant*, now argued that no prohibition ought to go, for that THE LIBEL here is concerning spiritual matters. And without question the archbishop, as metropolitan, has the supreme jurisdiction over the bishops, and every thing that calls itself ecclesiastical (a). So says *Archbishop Whitgift*, in his *Reg.* 177. which was printed in 1592. Indeed he talks there of THE HIGH COMMISSION COURT; but however as to this matter it is the same thing; for I confess the archbishops are tied up only as to such matters as come within their ecclesiastical consueance (b). And no instance can be given where a prohibition has been granted to restrain the archbishop from reforming his clergy in matters of this nature which are mentioned in THE LIBEL.

THE BISHOP OF
CHESTER'S
CASE.

The first charge against the bishop is, for *simony*; and certainly this is singly and purely an ecclesiastical offence, and depends chiefly upon THE CANONS of the church, as appears in *Lyndewode*, 397. at the General Council of *Chalcedon*.

The second charge is, for taking exorbitant fees for giving institution, which is wholly of a spiritual nature; and by the 135th canon it is expressly said, that "no money ought to be taken for "institution or collation."

The third charge is, for *misapplying charities*, and converting of them to his own private use; and though I do agree, that this matter may be redressed in *Chancery*, upon a commission of *charitable uses*; yet here the design is to inflict a punishment on the bishop for this offence, which is not punishable in any other place.

* The fourth charge is, for *certifying a falsity* under his episcopal seal, in a matter which very nearly concerns the government; for he has frequently certified that several persons had taken the oaths, when in truth they had not taken them.

* [434]

This is the case as it stands before the archbishop; and I hope your lordship will not prohibit the archbishop from proceeding to enquire into these offences, and to punish them by ecclesiastical censures. It is true, they ground their suggestion upon this, that these matters are punishable in the temporal courts, as in the case of *Slater v. Smalbrook* (c): Prohibition on suggestion that the spiritual court sued one there for forging letters of ordination; but the truth is, it was to deprive him because *mere laicus*; and no prohibition was granted. But this is no objection, for the prosecution here is of a different nature, it is *pro salute animæ*, as in the case of *Searl v. Williams* (d). And suppose two or three of the crimes mentioned in THE LIBEL, of which I have only repeated a few, were of a temporal nature, yet you will not grant a general prohibition as to all: indeed, a consultation may be *quoad*, &c. but a prohibition *quoad*, &c. is a *rara avis in terris* (e).

(a) 1. Bl. Com. 380.

(b) 11. Co. 49.

(c) 1. Sid. 217. See also 1. Sid. 251.

(d) Hob. 288. See also 1. Keb. 121.

2. Keb. 215.

(e) 2. Keb. 215.

HOLT,

THE BISHOP OF
CHESTER'S
CASE.

1. Salk. 134.
2. Lev. 64.

HOLT, *Chief Justice*. If it be a matter that relates to the duty of his office, as a cause of deprivation, &c. they may proceed; and so it is in the case of perjury by a clergyman, he may be prosecuted in THE SPIRITUAL COURT, though the crime is of temporal consuance, but you will not go originally there.

SIR B. SHOWER. *Mr. Serjeant's* argument shews, that there are many points very doubtful and difficult, therefore I pray that we may declare upon a prohibition.

HOLT, *Chief Justice*. If he were only punished there for a temporal offence, it would be another matter; but what was the ground of *Cawdry's Case* (a)? Why, he was deprived for acting against the duty of his place.

GOULD, *Justice*. The Church has always had a power to clear themselves (b). In the *Second Institute* (c) it appears, that in the time of *Henry the Sixth* the clergy's extortions were complained of, which were redressed amongst themselves. And the case of * *Slader of Birmingham*, in *Trinity Term*, in the sixteenth year of *Charles the Second*, is a full authority in point; it was for forging orders, for which he was punished in the spiritual court.

ROKEBY, *Justice*. Suppose a clergyman commits a temporal offence by which he also acts against the duty of his place, shall we prohibit the spiritual court from punishing him in not doing his duty? In the *Case of Properties* (d), you have good learning as to this matter.

HOLT, *Chief Justice*. If you do enter your suggestion on THE ROLL, you shall enter all the fact, that it may remain on record for ever.

WRIGHT, *Serjeant*. Their design is only to delay us, and to get off for six months. If they have any thing to offer, I desire they may do it now, and enter it upon THE ROLL.

HOLT, *Chief Justice*. Indeed, whenever you move for a prohibition, it is supposed that the suggestion is entered upon THE ROLL, though this is not practised.

It was said by the Counsel, that if the prohibition is not granted, we generally carry away the suggestion in our pockets.

Adjournatur.

At another day this case was again debated.

HOLT, *Chief Justice*. The ecclesiastical men are governed by different laws than other men are; and therefore we are not so proper judges of the matters of facts set forth in THE LIBEL, as the simony and the charity perverted, and the taking of money for or-

A suggestion containing all the facts of the case, ought to be entered on the Roll before motion for a prohibition is made.

S. C. 1. Salk. 136.

(a) 5. Co. 1. Reph. 59.

(b) 31. Edw. 3. c. 4.

(c) 2. Inst. 386.

(d) Davis Rep. 3. b.

Easter Term, 11. Will. 3. In B. R.

dination. Indeed, it seems strange that a man should give money for taking on him the cure of souls.

THE BISHOP
OF CHESTER'S
CASE.

SIR B. SHOWER. Here the question is, Whether if the custom be to take such and such fees, and the party take more than the custom allows, this is not conusable here? Indeed, if he had done any thing in general against the duty of his office, it might be otherwise.

* [436]

HOLT, * *Chief Justice*. I do not know why they should not try a custom which relates only to an ecclesiastical person when a lay fee is not touched. So in the case of a *pension* by prescription there shall be no prohibition granted (a). But that is not the case, for you have not suggested that you ought to take any thing by custom; you do not say there is any custom for you.

2. Vent. 239.
1. Salk. 58. 551.
1. Vent. 3. 120.
265. 274.
Cro. Eliz. 810.
Cro. Car. 238.
Hob. 247.
1. Mod. 167.
176.
3. Mod. 268.

PER CURIAM. Take a prohibition, *quoad*, &c. (b)

In the case of *Crook v. Sampson and Another, churchwardens* (c), Libel in the bishop's court of *Exeter* for a seat which the churchwardens assigned to one M. in whose right the plaintiffs claimed. The defendants there, who now prayed the prohibition, prescribed by a *que estate* for the seat as ancient, and belonging to their tenement in W. and that they, and all those, &c. had used to repair. It was doubted whether this prescription in the nave of the church be good; but in an aisle it would be good. THE COURT inclined, that such a prescription in *navi ecclesie* may be for special cause: but they would not grant a prohibition. In the case of *Jacob v. Dallow* (d), cause was shewed why a prohibition ought not to go to THE ECCLESIASTICAL COURT, where the libel was for a seat in the church. I take it, that the placing and displacing of people in the seats of the church belongs purely to the *ordinary*, unless there be a prescription by one who has a freehold (e). In the case of *May v. Gilbert* (f), prohibitions were denied. Then some prescriptions are also triable in THE ECCLESIASTICAL COURT, as *modus decimandi*, repairing of churches.

8. Mod. 338.
1. Salk. 551.
Ray. 246.

Ante, 69, 70.
Farell. 8.
Skin. 7.

* *E contra*. Where a man shews a fixed interest, he may have an action on the case, which must be tried at common law: for how can they in the spiritual court award damages? Here is a direct prescription, which they deny.

* [437]

CURIA. Take a declaration, and set forth the suggestion.

Suppose a man has sat there for some time, and he is disturbed, shall not he sue in THE ECCLESIASTICAL COURT? The de-

(a) 2. Inst.

(c) S. C. 2. Keb. 92.

(b) But see the case of the Bishop of St. David's v. Lucy, 1. Salk. 136. S. C.

(d) 2. Salk. 551. 6. Mod. 230. 7.

3. Salk. 90. S. C. Carth. 484. S. C. 1. Ld. Ray. 447. 539. S. C. 12. Mod.

Mod. 8. 2. Ld. Ray. 755.

(e) 2. Roll. Abr. 288. Hob. 69.

(f) 2. Bulst.

237.

fendant

Easter Term, 11. Will. 3. In B. R.

THE BISHOP
OF CHESTER'S
CASE.

pendant surmises, that he and his ancestors have used, time out of mind, &c. to have an aisle with a seat in the church for himself and family. This was on a LIBEL for a seat in the church. Because it appeared upon the examination of the party himself, that the parish have always used to repair the aisle and seat, the Court would not grant a prohibition, for that proves his ancestors were not founders of the said aisle and seat. *Godb. 199. Moore, 878. 12. Rep. Garaen v. Pym.*

TRINITY

TRINITY TERM,

The Eleventh of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt,*

Sir Henry Gould, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

*[438]

* The City of London against Vanacre.

Cafe 228.

HOLT, *Chief Justice.* This case now stands for the resolution of the Court. It comes before us upon a return to a *habeas corpus* (a); in which it is set forth, that the CITY OF LONDON is an ancient city, and a body politic; and that KING JOHN, by his charter, did grant that the mayor and aldermen should chuse any of the freemen to be their sheriffs. Then they return that branch of MAGNA CHARTA which relates to the city, and the several acts of confirmation, &c. and that it has been a *custom*, time immemorial, for the mayor and aldermen to make new *bye-laws* for the advantage of the city; and that in pursuance of that custom, in the seventh year of King Charles the First, an act of common-council was made, by which it was enacted in manner following: "That the election of sheriffs shall be made by the mayor and aldermen, and that no person so elected shall be discharged, unless he make oath that he is not worth ten thousand pounds; and that if such person shall not at the next court give bond in 1000l. to serve the office, he shall forfeit 400l. and 100l. more if not paid within three months; is a good bye-law, and reaches to Middlesex although it be out of London. S. C. 1. Salk. 142. S. C. Carth. 480. S. C. 12. Mod. 269. S. C. Holt, 431. S. C. 1. Ld. Ray. 496. Ante, 105. 156. Raym. 447. 1. Mod. 10. 164. 1. Salk. 192. 341. 352. 6. Mod. 123. 277. 4. Mod. 27. 3. Mod. 193. 2. Jones, 145. 1. Jones, 162. Cart. 68. 114. 1. Vent. 21. 196. 1. Sid. 284. B. R. H. 384. 1. Burr. 235. 533. 4. Burr. 2260. 1. Bac. Abr. 338.

(a) See the case of Ballard v. Bennet, 2. Burr. 775.

"be

Trinity Term, 11. Will. 3. In B. R.

THE CITY OF
LONDON
against
VANACRE.

* [439]

" be annually on *Midsummer-day*, and that no citizen who is
" elected shall be discharged, unless he will take an oath that he is
" not worth *ten thousand pounds*; and that if the person elected shall
" not appear at the next court, and give a bond of a *thousand*
" *pounds* to take upon him the office of sheriff at the eve of *St.*
" *Michael* then next following, or shall refuse to take upon him
" the said office, or shall not appear at the next court, that then
" he shall forfeit *four hundred pounds*, and if he do not pay the
" sum within three months afterwards, that he shall forfeit *one*
" *hundred pounds* more." * That *Vanacre* was chosen sheriff such
a day, &c. but did not appear at the next court either to take upon
him the said office, or to make any excuse for his discharge, by
reason of which he had forfeited the sum of *four hundred pounds*.

The question was, Whether this act of common council shall
be so far obligatory as to compel the payment of this four hun-
dred pounds?

And though several objections have been made, yet we are of
opinion, that this is a good bye-law, and that a *procedendo* ought
to go.

FIRST, It is objected, that the mayor and aldermen in com-
mon-council have not power and authority to make such a bye-
law.

SECONDLY, That it imposes hardships upon the citizens them-
selves, in respect of this oath which they are obliged to take.

THIRDLY, That it is unreasonable he should forfeit four hun-
dred pounds if he do not appear at the next court and hold,
unless they can excuse it, which, say they, makes them arbitrary.

FOURTHLY, That here is no provision made that the party
shall have notice of this election, that he may have an opportunity
to excuse himself.

These are the objections that have been made to this return.

Now as to THE FIRST OBJECTION, we are of opinion, that
this privilege of making bye-laws and ordinances is vested in the
city by common right, if not by custom, for it concerns the
good and better government of the city, and every city and town
corporate may, by an essential power inherent to their constitution,
make bye-laws for the advantage of the government of that body
politic; and this is the true touchstone of all bye-laws, which
ought to be for the administration of the government with which
they are intrusted. LORD HOBART, in the case of *Norris v.*
Staps (a), says, " that though power to make laws is given by
" special clause in all corporations, yet it is needless; for I hold it,"
Every corporation may, without any special power in the charter for that purpose, make bye-laws for the good government and advantage of the corporation; for it is a power inherent and essential to its constitution.

10. Co. 31. Hob. 211. Moor, 579. 1. Salk. 142. 1. Bac. Abr. 505.

(a) Hob. 211.

continues

Trinity Term, 11. Will. 3. In B. R.

continues his lordship, "to be included by law in the very act
 "of incorporating; for as reason is given to the natural body for
 "the governing of it, so the body corporate must have laws as a po-
 "litic reason to govern it; but those laws * must ever be subject to
 "the general laws of the realm, and subordinate to it." So is the
Chamberlain of London's Case (a). Now it is for the advantage
 of the city to have such a bye-law, that the sheriffs should be men
 of substance, that they may be the better enabled to execute so
 great a trust. Then the very constitution of KING JOHN's charter
 gives the CITY OF LONDON power to chuse sheriffs; and it would
 be a vain thing for the charter to give a power to chuse sheriffs,
 if they cannot be compelled to hold that office; and therefore the
 persons whom the city nominates are obliged to stand. So by the
 acceptance of any letters patents there is an obligation on the
 parties accepting to perform all things thereby required, as to
 undergo all charges, offices, &c. Certainly these citizens who
 were then in being when this charter was first granted, were
 obliged to stand, and so are all those who come after. Now if
 there be letters patents which grant to the body politic an exemp-
 tion from tolls, or privileges of fairs, commons, &c. yet all the
 particular members shall take advantage of these grants, though
 they were made to the body politic; therefore it is but reason-
 able that the particular members, who reap the benefit of the body
 politic, should also take upon them the burthen and charge of of-
 fices incident to it. Then no body can question but that this
 constitution is for the advantage of the city; and therefore they
 must observe it exactly, or else it is a forfeiture of the whole fran-
 chise; and it is not in their power to make an alteration in their
 constitution. And to secure this franchise, it is necessary for them
 to have a power to compel them to execute this office, or else this
 franchise will be lost; and that the aldermen may make ordinances
 to enforce the execution of their bye-laws, which are for the ad-
 vancement of the public good of the city, appears in *Snelling's*
Case (b) very full. Now as to MR. NORTHEY's objection,
 that the party refusing to take upon him this office may be in-
 dicted, and that it was held so in *Norwood's Case* (c): FIRST, This
 will not save the forfeiture, for then there must be a vacancy in the
 mean time of this office of justice; so that they are bound to name
 such sheriffs as shall stand, that there may be no failure of the exe-
 cution of justice; and therefore it is that they chuse sheriffs so
 long beforehand, that if some * refuse to hold, they may chuse
 others; so that there may be no forfeiture of the franchise. Then
 here can be no indictment grounded; for to refuse that he will
 come and appear such a day will not do, for though he say to every-
 body that he will not come, yet he may come notwithstanding; and
 here he must come within such a time, and acquaint the mayor and
 aldermen that he will stand, or else he must be fined. But it is
 objected farther, that though they may make such a bye-law which

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 LONDON
 against
 VANACRE.

* [440]

Vide 1. Roll.
 Rep. 365.
 3. Leon. 264,
 265.
 Moor, 576, 577.
 580.
 8. Co. 127.
 Hard. 56. 210.
 Cart. 68. 114.
 Acc.
 3. Burr. 1827.
 4. Burr. 2515.
 1. Bac. Abr. 505.

* [441]

(a) 5. Co. 62.

(b) 5. Co. 82. Cro. Eliz. 409.

(c)

shall

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shall affect the city, yet it shall not reach to the county of *Middlesex*, which is out of their jurisdiction. But I take it, that this act of common council binds; for though the execution of the act be out of the city, yet it is for their advantage, and the persons of the sheriffs are within the city, and the sheriffalty is within the city of *London* and its jurisdiction, and the interest of it.

1. Vent. 21. 196.
Moor, 580. 585.
Pal. 3.
Hard. 55.
2. Brownl. 179.
278.
Skin. 381.

THE SECOND OBJECTION is, That it is unreasonable to impose this oath, that he is not worth *ten thousand pounds*. But this is so far from being a hardship upon the citizens, that it is a relaxation of a burthen which lay on them before; for heretofore, though a citizen was worth never so little, yet he was bound to hold this office. And so it was resolved in the case of *the City of Norwich* (a), that a man who is chosen sheriff of that city is bound to serve it, and that no incapacity will excuse him; so that if he do not qualify himself by receiving the sacrament, &c. it is his own fault, and he shall be punished for not holding the office. So is the case of *Player v. Jenkins* (b) on a bye-law in *London*, that there shall be but four hundred and twenty carts let to hire in *London*, and that if any more be used the owners shall forfeit forty shillings; and by the Court, It is a good bye-law; for if the number of carts should not be restrained, they would stop the streets and be a great nuisance. But say they, What if the person chosen to be sheriff be a madman or a fool, &c.? Why, these incapacities are excepted, they are tacitly excepted out of all laws whatever, and therefore this bye-law shall not extend to such persons; and the bye-law need not run, "PRO-VIDED that the party to be chosen sheriff be not a fool or a madman;" it is excepted without it.

* [442]

* THE THIRD OBJECTION is, That he is obliged to appear at the next court of aldermen, and to hold the office, unless he can shew a good excuse to the contrary. This, say they, gives an arbitrary power to the court of aldermen to allow or disallow the excuse.

To this I answer, that this part of the bye-law is for the advantage of the citizens, for that they may make any reasonable excuse that is consistent with their constitution.

But suppose the party who is chosen sheriff make a good excuse, and they will not allow it, why, he may either plead this, or give it in evidence upon an action brought; for it is not reasonable that the party should be concluded by their disallowance if the excuse be reasonable; so upon that case of the commissioners of sewers, their discretion must be grounded upon reason, and it must not be fanciful.

(a) 1. Sid. 284. 1. Roll. Abr. 364. 4. Vin. Ab. 308. But see the case of Robinson v. Watkins, 4. Mod. 216.
(b) Ray. 288. 324. 328. Gavel v. Tasker, Skin. 371, *semb. contra*.

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THE FOURTH OBJECTION is, That here is no notice given of this election, and it may be that he was absent at the time of the election, and then it would be very hard that he must take notice of it.—To this I ANSWER, That every freeman and citizen, being a member of THE BODY POLITIC, is supposed to be present where the whole body resides; and though in fact one of the members should be absent, yet it was his duty to be there, and he is supposed in law to be there: he shall be obliged to take notice of this election at his peril. Then the election is made in view of the city, of which all persons are to take notice as members of THE BODY POLITIC; and the proclamation is also made in the most notorious place of the city, viz. on THE HUSTINGS, where every person may take notice of it. As in case of outlawry, the supposition is that the tenant is commorant upon the land, &c. and so at the *quinto exactus*, that the party is at the county court present: so here, Is it not the same case that the freemen and citizens of London are resident where the whole body politic is assembled? Every member of it is virtually and legally there, and all acts done there conclude his assent, and therefore he ought to take notice of it. Suppose the person so chosen was at York at the time of his election, yet he might have left word with some of his own family to give him notice of it, and to apply to the court of aldermen to excuse him. * The mischief would be very great if every rich citizen might withdraw himself from the service of the city against the time of the election; for then you would have nobody to execute the office of sheriff. I must needs say, that the government of the city very much concerns the good of the whole nation; for here the trade of the kingdom is chiefly managed, which ought to receive all the care and protection the law can give. I have endeavoured to inform myself as to the several acts and bye-laws which have been made about persons withdrawing themselves from the service of the city; and I find there is one act of common council by which it is ORDAINED AND ENACTED, "That if any person doth willingly withdraw himself from serving any office in the city, he shall forfeit the sum of one hundred pounds, and also be disfranchised, unless he do come with six compurgators, and declare that he went abroad about his lawful occasions." But notwithstanding all these precautions, and that elections have been always practised for many ages in the manner as is set forth in this return, yet, I know not for what reason, there is a strange temper of opposing this plain method of electing sheriffs amongst some of the citizens. But as our predecessors who sat in this place have ever supported the good government of the CITY OF LONDON, so we shall do the same, and I hope that it will continue so when we are dead and gone.

And therefore WE ARE ALL OF OPINION, that this is a good bye-law, and that Mr. Vanacre has justly forfeited the sum of four hundred pounds for not complying with it.

THE CITY OF
LONDON
against
VANACRE.

Under the custom of London, that the person elected sheriff of that city shall forfeit four hundred pounds, unless, at the next HUSTINGS subsequent to such election, he swear that he is not worth 10,000l. it is no excuse, to avoid the forfeiture, that no notice was given of such election, for every freeman is bound to take notice of it.

1. Salk. 142.
Carth. 484.
1. Roll. Abr. 365.
Cro. Car. 493.
1. Burr. 533.

* [443]

Case 231.

The King against Harniffe.

On an indictment of forcible entry, if the force be found, restitution shall be made immediately.

THE case here was this: Upon a *vi laica removenda*, a parson had forcibly seized THE CHURCH, and, upon *inquisition*, the force was found; but the justice of the peace did not presently restore the possession (as he ought to have done), but had a record of it made up, and deferred the delivery of the possession for two or three years.

* [444]

And now all this matter appearing to the Court, it being removed before them by *certiorari*, they were of opinion, that this proceeding was very irregular, and that *restitution* ought to be awarded.

S. C. Carth. 496.
S. C. 1. Salk. 260.
S. C. 3. Salk. 313.
S. C. Holt, 324.
S. C. 1. Ld. Ray.
440. 482.
S. C. Corny. 61.
S. C. 12. Mod.
268.
2. Brownl. 266.
2. Bullst. 139.
2. Just. 380.
Bro. "Faux Im-
pris." 32.
Bro. "Det." 16.
Bro. "Execu-
tion," 135. &c.
Comb. 262.
2. Bac. Abr. 180.

* HOLT, *Chief Justice*. I ground my opinion upon the authority in *Dr. Bonham's Case* (a), which says, that the commitment must be immediately. So upon the statute of 8. Hen. 6. c. 9. of Forcible Entry, when the force is found by the inquisition, restitution must be made immediately. The reason of one case is the same with the other.

ROKEBY, *Justice*. Where an inquisition is taken, it is supposed there is a quicker remedy; and therefore we think it is not in the power of the justice of the peace to defer restitution so long. The act requires it to be done forthwith; and so is the authority expressly in the latter end of *Dr. Bonham's Case*; it must be restored upon view.

PER TOTAM CURIAM, Let restitution be awarded.

(a) S. Co. 119, 120.

Case 232.

The City of York against Toun.

Indebitatus assumpsit will lie for a fine for not holding the office of sheriff.

INDEBITATUS ASSUMPSIT for a fine imposed upon the defendant for not holding the office of sheriff in the city of York.

S. C. 1. Ld. Ray.
502.
Ante, 439, 440.
5. Co. 62.
Cart. 68. 114.
1. Bac. Abr. 165,
166.
2. Bac. Abr. 16.

SIR B. SHOWER. With submission, an *indebitatus assumpsit* will not lie in this case; for how can there be any privity or assent implied, when a fine is imposed on a man against his will? Nor is there any precedent consideration; neither do they shew any right to this fine; nor who imposed it, &c.

HOLT, *Chief Justice*. We will consider very well of this matter; it is time to have these actions redressed. It is hard that customs, bye-laws, rights to impose fines, charters, and every thing, should be left to a jury.

Adjournatur (a).

(a) HOLT, *Chief Justice*, was of opinion, that an *indebitatus assumpsit* would not lie in this case; Rokeby, *Justice*, seemed to be of a contrary opinion; but it does not appear that any judgment was given, S. C. Ld. Ray. 502. It has, however, been decided that *assumpsit* will lie for a penalty forfeited by the bye-law of a company for not serving the office of steward in pursuance of such bye-law, *Barbers v. Pelton*, 2. Lev. 252; for *scavenger* due by the custom of London, Mayor

of London v. Sory, Carth. 92.; for a fine due on admission to a copyhold estate, *Shuttleworth v. Garbet*, Carth. 90. *Evylin v. Chichester*, 3. Burr. 1717. *Whitfield v. Hunt*, Dougl. 727. *notis*; for money due for *petit customs*, Mayor of Exeter v. Trimlet, 2. Will. 95.; and for *tolls*, *Seward v. Baker*, 1. Term Rep. 616. See also *Bell v. Burrows*, Bull. N. P. 129. *Sanderson v. Bignal*, 2. Stra. 747. *Duppa v. Gerrard*, 1. Salk. 78. and 1. Bac. Abr. 165.

Turner

Turner *against* Maine.

Case 233.

NORTHEY. This is an action of debt brought by the assignees of the commissioners of bankrupts, and it is not said that the defendant had notice of this assignment.

Assignees may bring action without giving notice of the assignment.

HOLT, Chief Justice. No notice is necessary.

6. Mod. 131.

E contra. How can we be guilty of a *devastavit* to them, and yet do not know when the assignment was made?

1. Salk 111.

* [445]

* **AT ANOTHER DAY** *it was insisted*, that this is an action brought by the assignee of the commissioners of bankrupts, surmising a *devastavit*, &c. and that the declaration is ill.

An action by assignees against the executors of the bankrupt's debtor, is good, after verdict, without stating the place of conversion, &c.

FIRST, It is not said where the *conversion* was.

SECONDLY, It does not appear, that at the time of suing out the commission he was indebted.

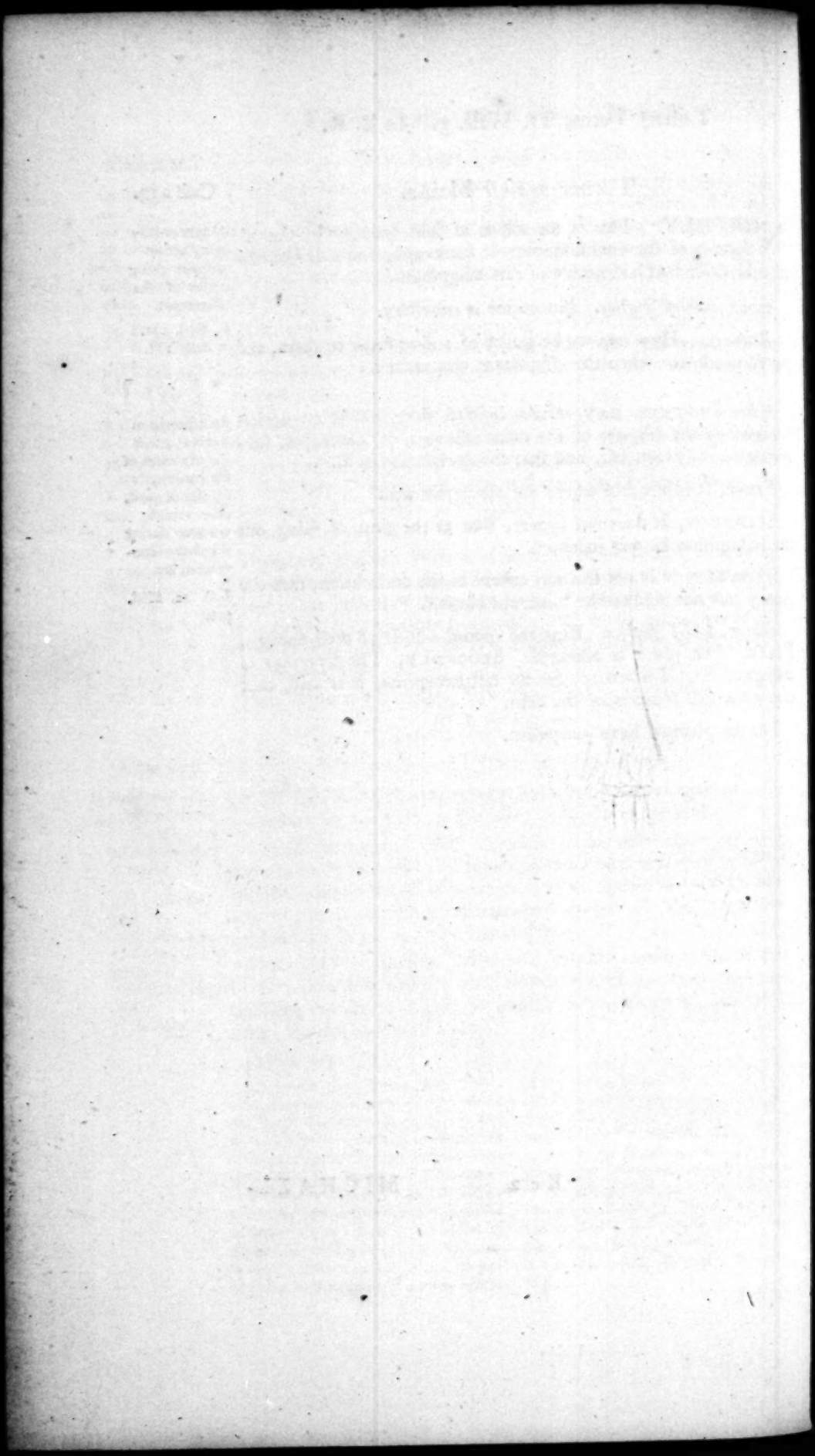
THIRDLY, It is not said any where in the declaration, that the money was not paid to the bankrupt himself.

S. C. 12. Mod. 306.

HOLT, Chief Justice. Read the record—It is all well enough.

FIRST, The place is alledged. **SECONDLY,** The *superinde* is enough. And **THIRDLY,** for the last exception, it is said, that execution still remains of the debt.

Let the plaintiff have judgment.



MICHAELMAS TERM.

The Eleventh of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* The King against Chandler.

* [446]

Cafe 234.

BRODERICK: This is a conviction of the defendant for deer-stealing, on the statute 3. *Will. & Mary*, c. 10. (a); and several exceptions have been taken against this indictment.

In describing the offence of a penal statute, it is sufficient if the information follow the words of the statute.

FIRST, That hunting was necessary as well as killing.—But I know not upon what rule such an exception is founded; nothing of it appears in the statute.

S. C. Ld. Ray.

581. 1. Show. 48. Ld. Ray. 791. 2. Burr. 697. Stra. 496. 1. Term Rep. 222. Boscawen on Convictions, 33.

SECONDLY, That it is "*forisfacit*" instead of "*forisfecit*."—But that sure is nothing, for the sense of the one word is as full and expressive as the other.

"*Forisfacit*" instead of "*forisfecit*" in a conviction.

S. C. Carth. 501. Stra. 853. Fitz. 124.

(a) But see the 16. *Geo. 3.* c. 30. by which this and all former acts relating to deer-stealing are repealed; a different mode of proceeding established; and other penalties inflicted.

E e 3

THIRDLY,

THIRDLY, That several sorts of killing is lawful, as appears in *Manwood's Forest Law*.—But here it is set forth, that the killing being within the park, was unlawful. S. C. Ld. Ray. 583. 1. Salk. 377, 378. 383. Carth. 503. 4. Com. Dig. 8vo. 570. Strange, 1119.

But the two things which seem to carry the fairest appearance * [447] of objections are these :

FOURTHLY, That the days of the killing do not appear.—But this signifies nothing, for if the killing were within a year before the indictment brought, it is sufficient. * So to say, between such a time and such a time, is well enough ; as in the case of a butcher for the buying and selling of live cattle contrary to the statute. Besides, it is not practicable to set down the day of the month ; and one of the mischiefs is, that it is difficult to discover when the fact was done.

S. C. Salk. 369. 378. S. C. Ld. Ray. 582. Carth. 502. 10. Mod. 248. Boscawen on Convictions, 23.

THE FIFTH OBJECTION is against the form of the indictment. It is said that it ought to have been, that if there were not sufficient distress found, then the offender should suffer imprisonment.—But this is not of necessity, for the forfeiture is sufficient to be set forth in the indictment.

S. C. Carth. 509. 1. Salk. 112. 385. 2. Salk. 681.

HOLT, Chief Justice. It does not appear whether the conviction was upon *confession* or upon *evidence*.

BRODERICK. It is said, we gave you a fair opportunity of being heard, and that thereupon he was convicted.

Str. 46. 630. Salk. 181. 383. Ld. Ray. 1405. 1546. 2. Burr. 679. 1. Str. 261. 3. Burr. 1783. Str. 44.

HOLT, Chief Justice. It seems to be well enough. Here the act of parliament designs a *summary conviction* before a justice of peace.

Certainty to a common intent is sufficient in summary convictions. S. C. Ld. Ray. 581. 2. Term Rep. 18.

Cafe 235.

Anonymous.

COUNSEL shewed cause, why a *prohibition* should not go to **THE SPIRITUAL COURT.** The foundation of the libel was for a rate to repair the church, and there was a sentence, and an appeal upon that. And now, after all this, they would have a prohibition ; but, with submission, they come too late. It is true, in the time of the late king *James the Second*, there was an act enabling the parishioners to raise money to rebuild the church. Ante, 389, 390, &c.—1. Mod. 79. 194. 236. 261. Raym. 246. 4. Mod. 148. Hard. 379. 2. Jon. 122. 1. Vent. 367.

act

act made for building this church (a), with power to raise a sum ANONYMOUS. not exceeding fifty thousand pounds; so that they suggest, that there was money enough raised by that act, and that this rate was illegally made; but your lordship will not examine into that now. Therefore we hope, that since here is nothing contrary to the act, or, for aught that appears, against law, the rule may be discharged.

E contra. I hope not; they snapped a sentence *ex parte* in the first place. But we go upon two points: * FIRST, Upon the act of * [448] parliament, which prescribes a particular manner of raising the monies; and therefore you cannot go to the spiritual court for it. SECONDLY, It is a rate declared to be made by the vestry, and no vestry could be called till the church was finished. That which we insist upon is, that the statute is not followed, which prescribes particular ways of raising the money.

HOLT, Chief Justice. Aye, what say you to that?

ANSWER. Our suit is for the repairing of the church, and not for the building of it.

HOLT, Chief Justice. But what will you say to the rate that is made for repairing the watch-house?; that certainly must be ill. Qy. If a parish-rate for repairing a watch-house be good.

ANSWER. This money was not raised for the watch-house, but for repairing the church. There is indeed something of a watch-house mentioned in the libel.

HOLT, Chief Justice. For that something a prohibition must go.

Give them a declaration in a prohibition.

(a) 1. Jac. 2. c. 20.

Clement against Beard.

Case 236.

SIR B. SHOWER. The libel in the spiritual court is for having married, and for cohabiting with his wife's sister's daughter, which, we say, is clearly prohibited by the Levitical degrees. So is Co. Lit. 235. 2. Jac. 1. Rot. 1032. 2. Jones, 191. Noy, 29. Hob. 181. Vaugh. 303. and many other books. It is said in some of the books, that an uncle may marry his niece, but that a man cannot marry his aunt, by reason of the superiority which she has over him. I hope that we shall have a consultation. A man cannot marry his wife's sister's daughter, for, by affinity, he is her uncle. * [449]

HOLT, Chief Justice. What superiority is there by an aunt over her nephew? What ground is there for the distinction? I cannot see any difference between the two cases. Now for your case, it is certainly within the degrees of affinity; and in the same degree of consanguinity, there would be no doubt of it; for a man cannot marry his own sister's daughter. I thought this case had been settled; there is a case against you in point. But

Lut. 1077. 2. Inst. 683. 1. Sid. 434. 1. Eq. Cases, 157. 1. Com. Dig. "Baron and Feme," (B. 4.)

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CLEMENT
against
BEARD.

indeed, if this marriage be not within the *Levitical degrees*, we are to hinder THE SPIRITUAL COURT from proceeding on a wrong foundation.

Adjournatur.

Cafe 237.

Alanson against Brookbank.

A citation from the spiritual court on a libel against a woman for incontinency, is not that kind of process, which, by 29. Car. 2. c. 7., is forbid to be served or executed on a Sunday.

S. C. 2. Salk. 625.
S. C. Carth. 504.
Ld. Ray. 706.
12. Mod. 275.
1. Hawk. P. C. c. 6. f.
Sellon's Pract. 16.

MR. NORTHEY moved for a prohibition to THE ECCLESIASTICAL COURT of *Durham*. This comes before your lordship upon a suggestion, that whereas a libel was exhibited in the spiritual court of *Durham*, against a woman for living incontinently with MY LORD, &c. (a). Now the ground of our suggestion is, for that this citation was served on her on a Sunday, which is contrary to the express words of the 29. Car. 2. c. 7. by which it is enacted, "That no process whatever shall be served upon a Sunday, except in cases of treason, felony, or breach of the peace." So that since the foundation of their proceeding is so irregular, they ought not to go on any further. Indeed, they pretend that this citation was well enough served, for that it was fixed upon the church-door according to the custom. But as to that, we say, they have no authority to fix the citation of any person on the church-door, but when the party cannot be cited personally; and it does not appear here, that this woman could not be personally cited, or that any attempt has ever been made to cite her personally; so that this citation has been wholly irregular, and consequently this woman has been wrongfully excommunicated, and therefore we pray, that she may be absolved. Then they object, that we might have insisted on this act of parliament in THE SPIRITUAL COURT: but we say, we were not bound to appear there by virtue of such an erroneous citation, it being against an act of parliament. And a citation is looked upon to be as much a process as any process whatsoever, in any of THE TEMPORAL COURTS, as appears by 25. Edw. 3. stat. 6. And therefore, the one must be as much within the act 29. Car. 2. c. 7. as the other; though indeed, we had the opinion of the court of *Durham*, that this act of parliament did not bind the spiritual court. But I hope your lordship will be of another opinion, and think fit to grant a prohibition.

* [450]

E contra. I am told by THE CIVILIANS, that the law and custom of the ecclesiastical courts is to fix the citation on the church-door, and that this is sufficient without any personal service, and that this has been the constant practice both before and since the statute of king *Charles the Second*, and we defy them to shew any precedent wherever any prohibition has been at any time granted since the making of the statute, which was a great many years ago.

NORTHEY. That is no objection; for though the custom has been so practised ever since the making of that statute, yet, we

(a) See Carth. 504.

say,

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say, it has been a mischievous practice, and therefore it is high time now to have it redressed.

ALANSON
against
BROOKSBAKE

HOLT, *Chief Justice*. Indeed, the greater question is, Whether the act of parliament extends to this process, which was used to be served in such a manner, by the fixing of it at the church-door, before the making of the statute? And suppose the ecclesiastical law is, and has always been, to serve this process on a *Sunday*, shall these general words in the statute take away their law? There may be some cases to which the statute may not extend; as for instance, there is A PROCLAMATION to be made on a *Sunday* at the church-door, by the statute of 31. *Eliz.* c. 3.; now this is not taken away by the general words of the statute. The reason of serving the citation in such a manner on a *Sunday*, may be, for that they cannot do it as well on any other day in the week. But the case seems to be different in the execution of other temporal process, which might have been as well served on any other day as on a *Sunday*. So that it does not seem to be the intent of the statute to take away the serving this process in such manner. But I do not like your partiality in THE SPIRITUAL COURT, for prosecuting the woman only, and not MY LORD, &c. Pray why should not you prosecute him, as well as the woman, if they are both equally guilty? (a).

(a) The Court held that the 29. *Car.* 2. c. 7. does not extend to this kind of process, or to summons at the church-door, S. C. 2. Salk. 625. S. C. 12. Mod. 275. and therefore, on the last day of the Term, although it appeared by the return of the APPARITOR, that he served it personally on a *Sunday*, a prohibition was denied, S. C. Carth. 504. But COMYNS, *Chief Baron*, in abridging this case, says, that although a citation may be published on the church-

door on a *Sunday*, according to the usage of the spiritual court, yet it cannot be served upon the person on a *Sunday*. 6. Com. Dig. "Temps." (B. 3.) In the case of Walgrave v. Taylor, Mich. 13. Will. 3. however, the above decision, viz. the service of a citation upon a *Sunday*, is recognized by HOLT, *Chief Justice*, as good law, and no notice is taken of the distinction mentioned by the Chief Baron. 1. Ld. Ray. 706. S. C. 12. Mod. 606.

* [451]

Machin against Malton.

Cafe 238.

HERE the case was, That Machin had substracted tithes, as they say, within the diocese of York, and then removed out of that diocese to Lincoln, and lived there; and seven years after his living there, they libel against him in THE SPIRITUAL COURT at York: upon which he brings an action upon the statute 23. *Hen.* 8. c. 9. for being cited out of the diocese where he lived.

If a person live in the diocese of York, and there substract tithes for land, and afterwards remove into and inhabit in any other diocese, yet he may be libelled against in the SPIRITUAL COURT of York, notwithstanding the 23. *Hen.* 8. c. 9. says, that no one shall be cited out of the diocese in which he lives; for by 32. *Hen.* 8. c. 7. the suit for withholding tithes is local.—S. C. 2. Lutw. 1057. S. C. N. Lut. 335. S. C. 2. Salk. 549. S. C. 3. Salk. 90. S. C. Carth. 476. S. C. 12. Mod. 252. S. C. 1. Ld. Ray. 452. 13. Co. 4. Cro. Jac. 321. Cro. Car. 97. 162. Hard. 421. Slin. 233. 1. Lev. 96. Godb. 191. 6. Com. Dig. "Prohibition," (F. 9.) 1. Bac. Abr. 616.

The

MACHIN
against
MALTON.

The question is, Whether this is within that act?

I take it, that this case is not within that act. Indeed, the design of the act was to maintain the jurisdiction of inferior dioceses (a). But where there is not a remedy in the inferior diocese, the party may be cited to such a court which has jurisdiction of the matter. And in the case of *Porter v. Rescheffer* (b), the archbishop is reduced to his proper diocese, or peculiar jurisdiction, except in five cases, FIRST, in default of the ordinary: SECONDLY, in the case of appeal: THIRDLY, if the ordinary dare not, or if he will not convent the party: FOURTHLY, if the ordinary be party to the suit below: FIFTHLY, in case of instance and request by the ordinary. In this case (c), the suit is begun below, and sentence there given, and after, an appeal upon this sentence to the delegates, and all this while no endeavour to stay these suits upon this statute: a legacy has been sued for in THE PREROGATIVE COURT, though the parties dwelt in another diocese (d). And in every one of the cases expressed in the statute, it is plain that "diocese and jurisdiction" are coupled together; so that it is evident, the word "diocese" imports "jurisdiction," and not any compass of ground; as appears also by the statute of 27. Hen. 8. c. 20. *Winch. Entr.* 570. In 2. *Roll. Rep.* 448. one was sued for tithes in the *Bishop of Salisbury's court*, the other sues a prohibition, for that he is in the jurisdiction of a *peculiar*, and that the archdeacon is his peculiar. I take this case to be expressly within the statute, which was made for the general ease of the subject from the oppression of the *apparitors*. For before that statute the poor subjects were worried up and down, and cited at great distances from the places where they lived, not only for defamatory words, but also for the subtraction of tithes, as appears in 1. *Kebl.* 481. The suggestion was, that the party was cited out of the county where he lived, which is not within 23. Hen. 8. c. 9. the cause of action being local for tithes within the diocese, and consultation was awarded on motion; and the canons made 1603. take notice of this statute. Then to say, that here is no jurisdiction in the inferior diocese is false, for the person may be sued in the place where he lives, for the subtraction of tithes in another diocese; and so is * the case of *Lynch v. Porter* (e), which was argued by THE CIVILIANS.

- 1. Lev. 96.
- 1. Roll. Rep. 339. 448.
- 2. Brownl. 121.

* [452]

- Godb. 134. 152. 154.
- 2. Saund. 423.
- 5. Co. 67.
- Cro. Eliz. 659.
- 243. Comb. 132.
- 1. Cro. 97.
- 2. Roll. Rep. 1. 191. 270.
- Poph. 197.
- 1. Bullst. 20.
- Latch. 203.

For it is a MAXIM in the civil law, that "the Court may follow the criminal." There is a case of *Woodward v. Mackprice* (f), where a prohibition was granted in such a case: *Woodward*, and others, who lived in the diocese of *Litchfield* and *Coventry*, but occupied lands in the diocese of *Peterborough*, were taxed by the

(a) See the case of *Fraums v. Powell*, Godb. 191.

(b) 13. Co. 5.

(c) S. C. 2. Brownl. 1.

(d) 2. Roll. Rep. 328. See also *Fita* 110.

(e) 2. Brownl. 1.

(f) 3. Mod. 211.

parishioners

Michaelmas Term, 11. Will. 3. In B. R.

parishioners where they used the land, for THE BELLS of the church; and, upon refusal to pay, a suit was against them in the diocese of *Peterborough*, and they had a prohibition. There is another authority, on which I chiefly depend; it is the case of *Jones v. Boyer (a)*, where it was agreed, that if a man inhabit in one diocese, he has cause to sue for tithes in the same diocese in which he inhabits; and if in another diocese, there he ought to sue in the diocese where the defendant did inhabit, and not where the tithes are payable, nor where the plaintiff inhabits. The case is express for me, that the suit ought to be in the diocese where the defendant inhabits. Therefore upon this authority, which is so express for me, I pray your lordship's judgment for a prohibition.

HOLT, *Chief Justice*. As for that case of *Jones v. Boyer*, it was in the case of *personal tithes*, and there indeed "*forum sequitur reum*," but not so in case of *local tithes*.—We will give our opinions next Term (*b*).

(a) 2. Brownl. 28.

(b) S. C. 1. Ld. Ray. 535. says, "THE COURT awarded a consultation, because by the statute 32. Hen. 8. c. 7. f. 2. the suit for withholding tithes is in express words appointed to be be-

"fore the ordinary of the place where the wrong was done; but if it had been in another case, it had been within the 23. Hen. 8. c. 9. f. 2. and the prohibition should have continued." S. C. Carth. 476. accord.

MACHIN
against
MALTON.

Usher's Case.

Case 239.

I AM to pray your lordship for a *mandamus* to the vice-chancellor of the university of *Oxford*. It is in the case of one *Mr. Usher*, who has been expelled out of UNIVERSITY-COLLEGE in *Oxford*, and was refused his *fellowship* there; upon which *Mr. Usher* would appeal to the vice-chancellor and convocation; but the vice-chancellor refuses to admit of his appeal.

Mandamus to the vice-chancellor of *Oxford*, to receive an appeal upon expulsion of a fellow.

The question therefore is, Whether the vice-chancellor and convocation are VISITORS of this college? And we take it, that the body of the university in convocation are legal visitors of this college, as appears plainly by the statutes of the college; and they have all along continued to exercise this visitatorial power ever since the year 1219, in the fourth year of the reign of *Henry the Third*. Therefore we hope, that the * vice-chancellor shall be compelled to do his duty, and to receive the appeal.

Ante, 257. 314. 404. 421.
6. Mod. 18.
260. 386.
1. Bl. Rep. 58.
1. Wils. 266.

* [453]

Ad idem. That the vice-chancellor and convocation are THE VISITORS of this college, is without question; for they are appointed so to be by the statutes of the college, and by several public instruments: but it is a great question, Whether these VISITORS have an absolute power to condemn without cause? or, Whether it is not a limited power to reprobate for a good and lawful cause? For the act which constitutes visitatorial power, says, that they may condemn *ex causa legitima*. Then it is impossible for *Mr. Usher* to come at his right of appeal, but by proposing

Vide ante, 421, 422.

Michaelmas Term, 11. Will. 3. In B. R.

UNIVERSITY
CASE.

posing it to the vice-chancellor; and since he has refused to receive it, there is no other way but for your lordship to compel him to it by your *mandamus*, that he may do his duty; which now he declines to do, by stopping up the channels of justice.

HOLT, *Chief Justice*. You are too soon for argument: let me know how the case stands as to the fact. Read to me your constitution by the statutes, that I may know how this power is founded.

Then the statutes were read.

HOLT, *Chief Justice*. If you have any *mandamus* at all, it must be directed "To the vice-chancellor, master, and scholars in convocation."

SIR B. SHOWER. The vice-chancellor and doctors of divinity, and the proctors, are without doubt visitors of this college, and the vice-chancellor and the two proctors have three negative voices; and if either of them refuse to accept of this appeal, or to propose him to the convocation, it cannot be done. Then this gentleman stands expelled out of THE UNIVERSITY for a particular offence. And whether the crime for which he was expelled be true or not, he has acquiesced under that expulsion: so that now if this *mandamus* should be granted, it would occasion a great confusion in the university. And we say, that this gentleman is not capable of being relieved here, for that this is a cause not examinable in this place, there being proper visitors. And *mandamus*'s have been often denied, where it is plain that there is a VISITOR to whom the party grieved may appeal (a). Therefore we hope your lordship will not grant any *mandamus*.

HOLT, *Chief Justice*. The question is only this: Whether or no if an original VISITOR refuse to accept an appeal, and to do the party grieved justice, we shall compel him to it? — Let us be attended with the statutes of the college, and we will consider of it.

* [454]

Adjournatur (b). *

(a) See *Rex v. Bishop of Ely*, 1. Wils. 266. S. C. 1. Bl. Rep. 52.

(b) See 2. Term Rep. 338. a note of the case of *Rex v. Bishop of Lincoln*, Trinity Term, 25. Geo. 3. where a *mandamus* was prayed to the bishop as VISITOR of *Lincoln College* in Oxford, to compel him to receive, hear, and determine an appeal of *Dr. Hallifax*, who complained of an undue election to the office of rector of that college, to which *Mr.*

Horner had been admitted; and THE COURT determined, that where by the statutes of a college, a VISITOR is appointed who is to interpret the statutes, and an appeal is lodged with him, a *mandamus* will lie to compel him to hear the parties and form some judgment, though he cannot be compelled to go into the merits; for it is sufficient if he decide that the appeal came too late.

Case 240.

Anonymous.

Notice must be given before an order is quashed.

NOTE, Before we quash an order of sessions, we must have an affidavit of notice given to the parties concerned, or else we will only quash *nisi* on notice.

The

Michaelmas Term, 11. Will. 3. In B. R.

The King *against* The Inhabitants of Chersey.

Case 241.

IT was moved to quash an order of sessions, for that the only ground of settling a poor person in a parish, appears, upon the order, to have been, for that the *banns of matrimony* of the poor person were published in the parish-church; which is ill, for the notice to be given to the parish must not only be in writing, but the other ceremonies required by the statute of 3. & 4. *Will. and Mary*, c. 11. must be observed, and that act being an explanatory act, cannot be taken by equity.

The notice required by 1. Jac. 1. c. 17. 13. Car. 2. c. 12. and 3. *Will. & Mary*, c. 11. of a person coming to settle in a tene-ment under 10l. a year, cannot be supplied by any collateral act. 330. Skin. 620.

CURIA. Let it be quashed.

act.—2. Salk. 474, 473. 476. 478. 523, 524. 534. Ante, 330.

Captain Kirk's Case.

Case 242.

THE question was, Whether *Captain Kirk*, who was indicted for the murder of *Conway Seymour, Esq.* should be brought to his trial this Term?

On a surrender, in Vacation, to an indictment of murder, notice that he will enter his prayer for trial the first day of the ensuing Term, is not sufficient. S. C. 12. Mod. 304. S. C. Hol. 86. 1. Show. 190.

HOLT, Chief Justice. I am of opinion that this fact ought to be tried; for, as I take it, the prosecutor has been too dilatory in his prosecution; and men ought not to be restrained of their liberty any longer than a convenient time for them to be brought to trial. This remissness in the prosecution of criminals was looked upon to be a great mischief at the common law, and therefore was redressed by the 3. *Hen. 7.* c. 1. by which it appears, that justice ought not to be delayed.

But by **TURTON** and **GOULD, Justices**, the trial ought to be put off; for that after his surrender he did not give the prosecutor timely notice; and therefore he says, he is not prepared.

* [455]

At another day, *Captain Kirk* was brought up by rule of Court.

MR. MONTAGUE moved, that *Mr. Kirk* might be admitted to bail, for that he and the other gentleman *Mr. Cage* were dangerously ill, by reason of the badness of the air, and the inconveniency of the prisons; and that, upon proofs of such matters, the Court had frequently bailed persons, though the coroner's inquest have found them guilty of murder; and the reason is, because imprisonment in such * case is not designed as a punishment, but only to bring the parties to justice.

The court of king's bench will not bail a person committed for murder on account of ill health, unless it appear to be the immediate consequence of the confinement, and that

his life is in danger. 2. Inst. 185. 189. Salk. 61. 3. Bulst. 113. Kely. 90. Palm. 558. Dyer, 79. 1. Bac. Abr. 223. 10. Mod. 334. Stra. 49. 543. 2. Hawk. P. C. ch. 15. l. 80. Cowp. 333.

****, *à contra*, replied. It is true, YOUR LORDSHIP has power to bail in treason or murder; but you will not exert that power, unless it be in extraordinary circumstances; as in some

The court of king's bench will not bail a person in custody on an indictment for treason or murder, except on very extraordinary circumstances. Ante, 288. 323. 2. Jones, 210. 222. 1. Bulst. 85. 1. Koll. 268. 3. Bulst. 113. Ray. 381. Skin. 56. 1. Bac. Abr. 224. 3. Bac. Abr. 13. 14. 2. Hawk. P. C. ch. 15. l. 79, 80. 2. Hale, 129. 148. cases

CAPTAIN
KIRK'S CASE.

cases that have been quoted; and especially in such where the prosecution is thought not to be well grounded. But here is no pretence of a malicious prosecution, for that here are two inquiries for murder found, one before THE CORONER, and the other by THE GRAND JURY. But it is not doubted whether *Mr. Seymour* was killed by this gentleman; that too plainly appears. Here is no peradventure whether this unfortunate gentleman was killed by *Captain Kirk*; so that it is but reasonable that he should give account of spilling his blood. There has not here been any long lying in prison, this being but the first Term after their commitment. The blood of *Mr. Conway* is upon the land, until it be revenged, or the justice of the nation be cleared by a fair trial. I could remember YOUR LORDSHIP of a case, where a person, after he was out upon bail, was taken up in the Vacation, and was committed, it being in the case of murder, meaning *Mr. C.*

HOLT, Chief Justice. I was very well satisfied with what I did then, and am so still. But indeed, in this case I do not think that their affidavits are full enough. It does not appear, that by this imprisonment they are in danger of their lives. It is said in *Egerton's Case*, in the thirteenth year of *James the First*, that if there were any delay in the prisoners in the putting off their trial, or in not giving timely notice, there could be no bailing of them. And here, since they did not give notice of their render to the prosecutor, as this is good reason for deferring their trial, so it is also the same for not being bailed.

[* 456]

Case 243.

Lane against Cotton, Postmaster General.

An action will not lie against the POSTMASTER GENERAL to recover the value of an EXCHEQUER BILL inclosed in a letter, and delivered at the post-office, and lost.

THE plaintiff brought an action against *Sir Robert Cotton*, postmaster general, wherein he declares he sent a letter by the post, &c. in which there was inclosed an *exchequer bill*, and that this letter and bill were lost, &c.

* Upon the general issue pleaded, the special matter was found, viz. that the letter and bill were delivered to such a postmaster, and that afterwards the mail was robbed, and the letter and exchequer bill taken away, &c.

Upon arguing this case, THE COURT seemed to be of opinion, that the action was well brought against the defendant.

HOLT, Chief Justice. It would be very hard upon the subject, if this action should not lie. The crown has a revenue of a hundred thousand pounds a-year for the management of this office; and therefore care ought to be taken that the letters be safely conveyed, and that the subjects should be secured in their

17. 143.

S. C. Comy.

100.

S. C. Carth.

487.

S. C. 11. Mod.

12.

S. C. 12. Mod. 472.

S. C. 1. Ld. Ray. 646.

S. C. Holt, 582.

Carth. 485.

4. Co. 84.

1. Sid.

36. 1. Roll. Abr. 338.

3. Mod. 323.

217. Skin. 278.

Cro. Jac. 162.

Palm. 523.

Molloy,

209. 2. Mod. 270.

1. Bac. Abr. 48.

Roll. Ent. 103.

3. Bac. Abr. 561.

Harg. Co. Lit. 89.

b. note (3).

properties,

Michaelmas Term, 11. Will. 3. In B. R.

properties. And why should not this be the same with a *common carrier*, who must answer for the jewels or other valuable things that he loses, as appears in *Allyn's Rep. (a)*? Then it is very hard, that the subject should be prevented by the act of parliament from sending his letters by any other carrier against whom he might have his remedy, and yet not have his remedy against *the postmaster*, by whom he is obliged to send his letters.

LANE
against
COTTON.

But I was informed, that, afterwards, judgment was given in the court of king's bench for the defendant (b), *dissentiente* HOLT, Chief Justice.

(a) Barcroft's case, cited by ROLL, Chief Justice, in the case of Kenrigg v. Eggleston Allen, 93. But see Cowp. 764.

(b) See the arguments of the Judges accordingly, S. C. Com. Rep. 100. to 108. ; but it is said that the defendants, seeing that the plaintiff intended to bring a writ of error, paid the money, S. C. 1. Ray. 638. and thereby prevented the further litigation of this question.

3. Peer Wms. 394. notis. See Cowp. 763. The opinion of the three Judges, however, has been recognized and confirmed by the Judges of the court of king's bench, in the case of Whitfield v. Lord Le Despencer, in which it was solemnly determined, that an action will not lie against the POSTMASTER GENERAL for a bank note stolen by one of the *sorters* out of a letter delivered into the post-office. Cowp. 754. to 766.

Memorandum.

Case 244.

SIR THOMAS ROKEBY, KNIGHT, one of the Judges of the court of king's bench, died during this Term, after a long illness. 1. Ld. Ray. 303.

HILARY

HILARY TERM,

The First and Second of William and Mary,

I N

The Common Pleas.

Sir Henry Pollexfen, Knt. Chief Justice.

Sir Thomas Powell, Knt.

Sir Thomas Rokeby, Knt.

Sir Peyton Ventris, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

John Somers, Esq. Solicitor General.

* *Tippet against Eyres.*

* [457]

Trinity Term, 4. Jac. 2. Roll 1035.

Case 245.

IN debt upon a bond for three hundred pounds, it appeared, upon *oyer*, to be for the performance of an award to be made by *Barlow* "before the fourth day of *April*, or else to the umpirage of such a one as he shall choose, to be made on or before the sixteenth of *April*."

If a submission be made to arbitrators, so as the award be made before the first of *April*, or else to such umpire as they shall chuse, so as the umpirage be made before the sixteenth of *April*, and the arbitrators, making no award, nominate a person for umpire who refuses to act, they may chuse another person

The defendant pleaded, that neither the arbitrator, nor the umpire, made an award, *prout*, &c.

The plaintiff replied, confessing that the arbitrator made no award; but that on the first of *April* he chose and nominated one *Gyssop* to be umpire, who refused; and that then he named one *Clerk*, who accepted and awarded, &c. and sets forth a breach on demand.

VENTRIS, Justice. I am of opinion, that the award by *Clerk* is good; for the submission has put the matter to the determination of an umpire, and I think this umpire is sufficiently named by the arbitrators intitled to the power. It is true, that it is laid that they

umpire. S. C. 3. Lev. 263. S. C. 2. Vent. 113. 1. Sid. 428. 455. 1. Lev. 174. 285. 302. Raym. 187. 1. Mod. 15. 275. 2. Mod. 169. 2. Jon. 167. 1. Salk. 70. 72. 2. Saund. 64. 130. Kyd on Awards, 58. and see 2. Term Rep. 645.

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F f

named

Hilary Term, 1. and 2. William & Mary, In C. B.

TIPPET
against
EYARS.

named *Gyffop*, and it is as true that he did not accept thereof, and therefore could be no umpire; and that an acceptance is requisite, the manner of pleading proves. But it is objected, that this is an authority, and being once executed, cannot be acted over again. I agree, that an authority once well executed cannot be transacted anew; but where it is not well executed, it may be acted again: as where executors by devise have a bare power to sell land, though they make a feoffment, yet they may afterwards sell; and in our case the naming of *Gyffop* is only a commencement of the execution of his authority. Two persons cannot have a concurrent jurisdiction to make an award. 1. *Rel. Abr.* 261.

• [458]

ROKEBY, *Justice*. *Gyffop* had never any authority vested in him, for his refusal prevented it; so that I take it, the cases of authority do in no wise influence the present case. The arbitrator had an authority to make an award until the *fourth of April*, and then he had a * power to name an umpire; for *Gyffop* had no more than a communication, &c.

POWELL, *Justice*. The nomination of *Clerk* was good; for *Gyffop*'s was wholly avoided by his refusal: and it is fit that we should compare it with other cases of authorities; as where the lessee for years will not consent to the first livery, the same attorney may make livery again, as in *Malynes v. Tolin* (a). So if lands be given to J. S. the remainder to such a person as he shall appoint, and he appoints a monk, he may, notwithstanding, appoint again. So of elections, a void election is adjudged to be no election.

POLLEXFEN, *Chief Justice*. I agree, that if there be only a communication or discourse between them, that would not have amounted to a nomination; but *parols font plea*, we must take it as it appears in the record before us, and that says there was a nomination, and if there had been none, the other party could take advantage of it upon issue. I do agree, that an authority ill executed may be re-acted, as in the case of attorneys. But the arbitrator in our case has no other power than to nominate; which he has done, and I cannot imagine how *Gyffop*'s refusal should give him a new power. I know no difference between this and other powers: if the refusal make the nomination void, it must be immediately void, or else he has no power to make a new one; and if it do, then it argues that he has a greater power than the submission gave him, which was only once to nominate, which he has done. I take it, that where a man has only a bare authority, and no interest, his refusal shall not disable him from executing it; as if an executor, or an attorney, in the cases before-mentioned, should say they would do nothing, that

(a) Palm. 289.

Hilary Term, 1. and 2. William & Mary, In C. B.

will not discharge their naked power (a). So that this consequence may follow our case, that *Gyffop*, after his refusal, may, notwithstanding, make a good award; and if *Clerk* may do so too, there will be two umpires well chosen, and a concurrent jurisdiction, which is not allowed, as in the case of *Bernard v. King* (b). The case also of *Copping v. Hernard* (c) is very strong. But since my brothers are against me,

TIPPER
against
EYRES.

2. Mod. 169,
2. Jo. 167.

JUDGMENT for the plaintiff.

(a) Year-Book 14. Hen. 7. pl. 17. and Albany's case, Moor 605.

(b) 1. Roll. Abr. 6.

(c) 2. Saund. 130. S. C. 1. Lev. 235. S. C. Ray. 187. S. C. 1. Sid. 428. 455. S. C. 1. Mod. 15. See the

case of *Chace v. Dare*, Sir T. Jones, 168. where these two cases of *Bernard v. King*, and *Copping v. Hernard*, seem to be overruled; and the case of *Reynolds v. Grey*, 1. Salk. 70, 1. Ld. Ray. 222. 12. Mod. 120.

THE [illegible] OF [illegible]

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TRINITY TERM,

The Second of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyres, *Knt.*

} *Justices.*

Sir George Treby, *Knt. Attorney General.*

John Somers, *Esq. Solicitor General.*

* Mr. Pryn's Case.

• [459]

Case 246.

AN INFORMATION was exhibited in THE CROWN OFFICE against seventy poor persons, setting forth, that one *Mr. Pryn* was lord of such a manor, where the defendants assembled and met together in a riotous manner, and pulled down certain fences, &c. To which one of the defendants appeared and demurred.

THE ATTORNEY GENERAL may, by the common law, file a criminal information against persons for meeting together and pulling down certain fences erected by a lord of a manor.

The question was, Whether an *information* lies for this riot ?

SIR FRANCIS WINNINGTON. I conceive it does not, and that the defendants cannot be proceeded against otherwise than by *indictment* or *presentment* in the county where the fact was committed. And this I shall make appear : FIRST, By the ancient books of our law : By *Glanvil* (a), *Fleta* (b), and *Magna Charta* (c), no man can be charged but by indictment or presentment : so are the statutes 25. *Edw.* 3. c. 4. the 42. *Edw.* 3. c. 3. the 5. *Edw.* 3. c. 9. ; and in THE YEAR-BOOKS of the 26. *Edw.* 3. pl. 4. & 70. and 43. *Aff. pl.* 5. all suits of the king must be by *presentment* or *indictment*. I shall now shew to YOUR LORDSHIP from whence these informations had their birth, and how they had their names.

1. Salk. 372. 2. Hale P. C. 151. 2. Hawk. P. C. 369. 3. Bac. Abr. 165. 4. Burr. 2556.
4. Term Rep. 285. 4. Com. Dig. "Information" (A. 1.). 3. Bac. Abr. 94. 165. 2. Hawk. P. C.
2. 26. 4. Bl. Com. 303.

(a) *Glanvil*, book 1.

(b) *Fleta*, book 2. ch. 92. 102.

(c) *Mag. Car.* ch. 29. 2. *Inst.*

46.
F f 3

King

MR. PLYNN'S
CASE.

* [460]

King Henry the Seventh was a very rich prince, and used all the care and industry imaginable to encrease his coffers: the instruments he made use of for this purpose were *Empson* and *Dudley*, who, in order to accomplish their designs, procured an act of parliament to be made empowering justices of the peace, &c. upon INFORMATION for the king, to hear and determine all offences and contempts, except treason, murder, and felony (a). But this act was afterwards repealed (b), and condemned as injurious and oppressive to the king's subjects; and *Empson* and *Dudley*, the authors of those horrible oppressions and grievances, came both to infamous ends, for they were very fairly hanged; so there was an end of them and their informations (c). * In all *Rastal* (d), and in *Coke's Entries* (e), there are no informations except upon general statutes; and in *Rastal* I think there is hardly one information. *Lord Coke* (f) says, that no man ought to be punished but by presentment or indictment. Now I shall come down to THE PETITION OF RIGHT (g), which establishes and confirms the liberty of the subject; and ordains, that no man shall be tried but by legal process; and enumerates many things there wherein the liberty of the subject was invaded. But the king perceiving that the parliament struck very deep, and being tender of his royal prerogative, presently dissolved them, and did not call them again until the sixteenth year of his reign (h). It was in this long interval of parliament that this mischief crept in. The first information was in the fifth year of *Charles the First*, being exhibited against my *Lord Hollis, Elliot, and Others* (i). Their Counsel then insisted, against THE ATTORNEY GENERAL, that though the crime was punishable, yet he ought not to have proceeded by information, but by indictment or presentment. THE ATTORNEY told them there were many precedents, but produced none (k). After the long interval of parliaments (the intermission of which was certainly the cause of many irregularities both in church and state) comes the statute 16. Car. 1. c. 1. in the year 1640 (l), and the parliament presently abolished THE STAR-CHAMBER COURT, which had so long oppressed and harrassed the subject by their mischievous informations and other arbitrary proceedings; of which the parliament were so sensible, that they enacted, "that no court of that nature should ever again be set up in England." That parliament also takes notice of THE PETITION OF RIGHT. After this, informations seemed to be totally lost, but certain it is they slept until the restoration of *King Charles the Second*; after which they were sometimes made use of, though but very rarely neither, for they received but little countenance from the reverend Judges, with one of whom I had the honour to be acquainted, and that was my LORD CHIEF JUSTICE HALE, who I remember very well has often said,

(a) The 12. Hen. 7. c. 3.—See the statute at large in *Rastal's* edition of the statutes.

(b) By 1. Hen. 8. c. 6.

(c) 11 State Trials, 3.

(d) *Rastal's* Entries.

(e) Co. Ent.

(f) 4. Inst. 41. 1. And. 156.

(g) 3. Car. 1. c. 1.

(h) Hume.

(i) Cro. Car. 181. 604.

(k) See *Wingfield's Case*, Cro. Car. 251. 2. Danv. 473. *Lees's Case*, Cro. 593. *Freeman's Case*, Cro. 579.

(l) This was an act for the preventing of inconveniences happening by the long intermission of parliament. It was repealed by 16. Car. 2. c. 1.

that

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that "if ever informations came in dispute they could not stand, MR. PATTEN'S CASE. "but must necessarily fall to the ground." The reason why informations were so seldom questioned is, because they were very rare; and when few people are pinched, few do object. But I confess, of late times they have been more frequent than ever, and the mischiefs they produced are yet fresh * in our memory. I will not trouble your lordship with a long repetition, but I cannot pass by two or three of them without mentioning them. As first, that of *Sir Samuel Barnardiston*, against whom an information was preferred only for writing a merry letter to some of his friends in the country, for which he was fined ten thousand pounds (a). So about the election for sheriffs, an information was exhibited against *Pilkington, Shute, and Others* (b), and they were fined extravagant sums for nothing but because they would not betray their country by voting for such sheriffs as would be subservient to the then court faction and prerogative interest. I remember one, for only drinking to the *pious memory* of *Stephen College* (c); he was presently attacked by a furious information, and had an exorbitant fine imposed on him for so slight and frivolous a matter. Besides the arbitrary proceedings of these informations, many other inconveniences attend them.—FIRST, The party, if he be acquitted, cannot have any *costs* against THE KING, but after an expensive troublesome suit must sit down contented with his own loss, and be glad he escapes so (d).—SECONDLY, If a man come into court upon his recognizance he must plead *instantly*, though he cannot possibly be prepared for it, having never before heard the information. And this was my *Lord Russell's Case* (e). I cannot, MY LORD, conclude, without mentioning the late *Case of the Reverend Bishops* (f), whom the information brands for presenting a malicious, seditious, and scandalous libel, which, in truth, was nothing but a pious and humble petition, and which they were obliged to do by the laws of God and man. Certainly no jury could have ever found them guilty (g). I suppose it will be objected against me, that there are many precedents of *informations* in the office. But I answer in the words which a great and learned lawyer heretofore used, *Nil agit exemplum quod litem lite resolvit* (h). Wherefore, MY LORD, relying on the authority of the statutes I have quoted, none of which, as I ever heard of, are yet repealed, and in respect also of those inconveniences which are the essential concomitants to all informations, I pray YOUR LORDSHIP's judgment for the de-

(a) 3. State Trials, 939. ; and see Rex v. Johnston, 2. Show. 1.

(b) 3. State Trials, 630.

(c) 3. Mod. page 52. case 20.—See also the case of Cook, Snatt, and Collier, ante, 363.

(d) But this is now remedied by 4. & 5. Will. & Mary, c. 18.—And see Clerk's Case, 7. Mod. 47. ; Reg. v.

Danvers, 1. Salk. 194. ; Rex v. Woodfall, 2. Stra 1131. ; Rex v. Filewood, 2. Term Rep. 145. ; Rex v. Brooke, 2. Term Rep. 197. ; and Hullock on Costs, 578.

(e)

(f) 3. Mod. 212.

(g) 4. State Trials, 304.

(h) 1. And. 157.

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pendant, not only for * my client's sake, but for all the gentlemen's at the bar, nay for all the subjects of *England*, that our liberties may not be invaded, nor our properties trampled on, and our lives snatched away by these oppressive informations.

SIR WILLIAM WILLIAMS *for the Crown*. SIR FRANCIS WINNINGTON's argument is, I suppose, extemporary, and so I shall answer it. The matter on which this information is grounded is *a riot*, for which I think the information will very well lie, and is no innovation; for the officers of the court will inform you, that there are precedents of informations as ancient as indictments (a). As to the case of *Empson and Dudley* (b), the exhibiting of informations was not alledged as a crime against them, but it was for compounding of informations, and mixing popular actions in them (c). It is true, informations do not extend to capital cases; and where the statute says, "they shall not lie for life or limb," it implies, that they lie in other cases. The reason why the court of STAR-CHAMBER was repealed was, because there was nothing punishable there but what could be remedied by the common law in the king's courts, and not because they proceeded by information. So as to my *Lord Hollis's Case* (d), there the information was preferred against him and others for assaulting the Speaker in his chair, and for speaking seditious words in the house, for which judgment was given against them (e). And afterwards, in 1667, that judgment was reversed by the house of lords; but the reason of that reversal was, because this Court had intermeddled with matters done in parliament, and because THE ATTORNEY did craftily intermingle matters in the information, and not because he proceeded by way of information. And though I grant, that informations have sometimes been misused, yet the abuse of a thing will not destroy it; but if there be any irregularities committed, your lordship will reduce matters to their old stamp and method, and the Court may do it in their discretion. As to my *Lord Hale's* opinion concerning informations, I heard him make this distinction between an *information* and an *indictment*: in the first, every person gives a distinct fee; but in the last, one fee lies only for several persons. By this my LORD CHIEF JUSTICE HALE granted, that an information would lie; and truly I never heard it questioned before this time. * As for the information concerning my lords *the bishops* (f), those epithets of "malicious, seditious, &c." were only words of form and course, though I will not undertake to justify the proceedings of the late Government: we have all done amiss, and must wink at one another.

Cases in Law
and Equity, 101.

SIR GEORGE TREBY, ATTORNEY GENERAL, *for the king*. I never heard informations questioned before. It is certainly a doctrine very lately broached, and I believe will have very few profelytes to es-

(a) See the argument intended to have been made in this case by SIR B. SHOWN, 1. Show. 106.

(b) 11. State Trials, 3.

(c) See 18. *Eliz.* c. 5.

(d) See Lord Vaughan's report of this case, and S. C. Cro. Car. 181.

(e) Cro. Car. 130. 152.

(f) 4. State Trials, 304.

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pouse its interest. As for the old statutes which SIR FRANCIS WINNINGTON cites, that all proceedings shall be by *indictment* or *presentment*, Why may not *presentment* there be meant of a presentment by the king's attorney, which is nothing but an information? The proceeding by information has been constantly practised, and therefore is now the law of the land; and it is not created by the 11. Hen. 7. c. 3. In *Rastal's* and *Coke's Entries* there are many informations, some for intrusions, and others in nature of a *quo warranto*. So the statutes that restrain informers suppose, that there were informations before. As for my Lord *Hollis* and *Selden's Case* (a), that was, Whether an information would lie for a matter transacted in parliament? As to my LORD HALE's opinion, I am sure there were several informations in his time; and he was a very conscientious man, and if he had thought that informations were wholly unlawful, he would not have suffered them: but indeed, I have heard him tell the officers of the court, that the informations should not be vexatious, but never that they were illegal. All the records in THE CROWN OFFICE are so many authorities for us.

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Skin. 47. 60.
109. 111. 584.
637.

Cro. Car. 130,
131. 152.
Hob. 115. 109.
111.
Dyer, 93. 98,
376.

HOLT, Chief Justice. The matter truly seems not of any great difficulty, for we shall hardly now impeach the judgment of all our predecessors; it would be a reflection on the whole bar. In *Lamb and Winfield's* information (b) there were learned Counsel who would certainly have taken exceptions to the information, had they thought that it did not lie. My LORD CHIEF JUSTICE HALE complained of the abuse of informations, but not that they were unlawful. As to the statute of 11. Hen. 7. c. 3. I do not think that THE STAR-CHAMBER was set up then, but was at the common law; and so informations in that court and others were at the common law. So notwithstanding the repeal of 11. Hen. 7. c. 3. by the 1. Hen. 8. c. 6. yet afterwards the statute 32. Hen. 8. c. 9. of Maintenance, supposes, that informations still lay; and if it had been a new thing, that statute would have said, that there shall be an information for that crime, and not that it shall be punished by information, which supposes informations to lie. You could never move to quash an information against THE ATTORNEY, but an *indictment* you may. A man may make a better argument against *writs of inquiry* and *new trials* than against informations.

3. Mod. 58.
114. 119. 186.
283. 326.

Carth. 14. 226.

* [464]

DOLBEN, Justice. There was an information against *Plowden* (c), who was a learned man and a great lawyer; and if he had thought informations illegal, he would certainly have taken advantage of it. I confess, that in that long interval of parliament which SIR FRANCIS WINNINGTON mentions, between the fifth and the sixteenth of *Charles the First*, there were more irregularities committed in this court than ever were before. Then the business of *ship-money* was transacted in this court (d).

(a) 11. State Trials, 121.

(b) Cro. Car. 251.

(c)

(d) See *Hampden's Case*, 1. State Trials, 505.

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1. Saund. 301,
302.
2. Mod. 128.
132.

The next Term this question was moved again (a).

HOLT, *Chief Justice*. Informations were at common law, and so the statutes do suppose: the court of STAR-CHAMBER was taken away, because the crimes were punishable here. But a crime committed in *York* cannot be punished here by *indictment*, for it cannot be removed out of the county, where all indictments must be laid; therefore it is only punishable here by *information*. In the Books of Entries there are informations for perjuries and intrusions against the bailiff of *Westminster* and keeper of the *Gatehouse* (b), and yet there are no officers of the court.

ALL THE COURT were of opinion, that *informations* lay at common law.

And see 1. *Salk.* 374. that wherever a matter concerns the public government, and no particular person is intitled to an *action*, there an *information* will lie.

(a) Sir Bartholomew Shower was prepared to argue the *demurrer* to this information on the part of the Crown; but no Counsel appearing on the other side to

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(b)



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ject to the control of that visitor,
Ex v. Jennings, 420

W.

UMPIRE.

If arbitrators nominate an umpire who
refuses, they may nominate another,
for by his refusal their power is not
executed, *Tippet v. Eyres,* 452

WAGES.

See ACCEPTANCE, SESSIONS.

WITNESS.

See DEBT.

END OF THE FIETH VOLUME.



181.